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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FIRST NATIONAL BANK OF BAY CITY, plaintiff in error,
v.
GRANT FELLOWS, ATTORNEY GENERAL OF the State of Michigan, on the relation of Union Trust Co. et al. } No. 764.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT OF THE CASE.

This case involves the validity of section 11(k) of an act of Congress approved December 23, 1913, known as the Federal Reserve Act. 38 Stat. 251, 262, c. 6. That section gives to the Federal Reserve Board created by the act the following power:

> SEC. 11(k). To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.

The First National Bank of Bay City, Michigan, plaintiff in error, was chartered as a national bank on December 1, 1882, under the National Bank Act of June 3, 1864, 13 Stat. 99, c. 106, as amended. (See the National Bank Act of June 20, 1874, 18 Stat. 123, c. 343; Rev. Stat. sec. 5133, 5136; R. 4.) After the passage of the Federal Reserve Act it became a member of the system of banks therein established, and, on application, was granted by the board the right to act as trustee, executor, administrator, and registrar of stocks and bonds. (R. 5, 10.) On the relation of five trust companies the attorney general of Michigan filed an information in the nature of *quo warranto* in the Supreme Court of Michigan to prevent plaintiff in error from thus acting. (R. 2, 23.) The respondent bank pleaded the statutes and the authority granted in pursuance thereof. (R. 4.) The State attorney general demurred to the plea on the grounds (1) that section 11 (k) is unconstitutional in that it is beyond the authority of Congress to confer the power specified upon national banks; (2) that even if Congress possessed such authority it can not delegate it to the Federal Reserve Board; (3) that the granting of the corporate power specified is in contravention of the laws of the State. (R. 11.) The State court sustained the demurrer on the first ground, six of the eight justices expressly finding no contravention of State law. (R. 20–22.) By writ of error the case comes before this court on the pleadings. (R. 24.)

Leave having been obtained, the United States files this brief as *amicus curiae*.

SPECIFICATION OF ERROR.

The second assignment of error (R. 25) is as follows:

> The Supreme Court of Michigan erred in entering a judgment of ouster against the above named respondent, said judgment being based solely upon the decision that the act of Congress above mentioned [§11k] was and is void as beyond the powers conferred upon the Congress of the United States by the Constitution of the United States.

Two issues are thus raised:

1. Has Congress power to authorize a national bank to act as trustee, executor, administrator, or registrar of stocks and bonds?

2. Does the Federal Reserve Board in granting the permission authorized by section 11 (k) exercise nondelegable powers of Congress?

SYNOPSIS OF ARGUMENT.

I.

JURISDICTION.

While no jurisdictional question is raised by the pleadings, the Federal Reserve Board, appearing by counsel as *amicus curiae*, called the attention of the Supreme Court of Michigan to the fact that some doubt exists as to the right of a State court to enjoin and exclude a national bank created as a Federal agency from the exercise of powers granted it by Congress.

Inasmuch as the parties to these proceedings can not confer jurisdiction by consent it seems proper to call to the attention of this court certain cases which have a probable bearing on this subject, although it is the desire of all parties concerned and a matter of great public importance that the determination of the constitutional question involved be expedited as far as possible.

II.

CONSTITUTIONALITY OF SECTION 11 (K) OF THE FEDERAL RESERVE ACT.

(1) Every intendment is in support of the constitutionality of the act. The courts invariably hold that an act of Congress is constitutional unless its repugnancy to the Constitution is clearly apparent.

(2) It is well settled that Congress has the power to incorporate banking associations to be used as instrumentalities of the Government in the conduct of its fiscal affairs.

(3) The power to create carries with it the power to preserve. Congress may vest national banks with any powers it deems necessary to preserve the national banking system or the corporate entity of individual banks.

(*a*) The powers granted to such an association may be either public or private in nature.

(*b*) Every banking association organized under Federal law since 1791 has been endowed with powers purely private in nature, which powers have been exercised for its own advantage in legitimate competition with other corporations.

(*c*) These powers, though private in nature, need not be even incidental to the conduct of the Government's fiscal affairs. It is sufficient if they are necessary to the successful operation of the bank. The character of the powers and the degree of their necessity are matters of legislative discretion.

(*d*) While it is not essential that the powers conferred be incidental to the ordinary banking functions, nevertheless the powers specified in section 11 (k) are, in fact, exercised quite generally by corporations which also exercise commercial banking powers and are similar in many respects to other corporate powers exercised by commercial banks, including national banks.

(*e*) The laws of 44 of the 48 States and also of the District of Columbia provide for the formation of corporations with authority to exercise both fiduciary powers and commercial banking powers.

(*f*) In order to compete successfully with corporations organized or operating under State banking laws, national banks must be given powers substantially similar to those enjoyed by such State corporations. It was therefore not an unreasonable exercise of its discretion for Congress to determine that the powers of national banks should be enlarged by the addition of those specified in section 11 (k) of the Federal Reserve Act.

(4) Section 11 (k) has a direct relation to the underlying purpose of the Federal Reserve Act, to wit, the creation of a new basis for nonmetallic currency,

to be supported by a cohesive banking system, which should include a majority of the banks of the United States, and insure a currency stable in character and elastic in volume.

(*a*) The currency system created by the National Bank Act was made necessary by the lack of uniformity and by instability of the State bank note.

(*b*) Experience has demonstrated that while the National Bank Act provided a uniform and stable currency system it lacked elasticity and was otherwise defective.

(*c*) The Federal Reserve Act is designed to remedy these defects while preserving uniformity and stability.

(*d*) Section 11 (k) is a necessary factor in providing a more elastic currency and in insuring stability of the new currency system provided by the act.

(5) The section is not a delegation of legislative authority. The Federal Reserve Board is not empowered to permit any national bank to exercise any fiduciary power not enumerated in section 11 (k). Its power is administrative.

(6) Neither the granting nor the exercise of the powers in question involves any invasion of the sovereign rights of the States. The opinions of the Illinois and Michigan courts in this regard are based upon a manifest misapprehension of the effect of the exercise of these powers.

ARGUMENT.

I.

JURISDICTION.

A State court is without jurisdiction to enjoin the operation of a Federal agency.

In the case of *Ableman* v. *Booth*, 21 How. 506, the Supreme Court of Wisconsin held that the fugitive slave law was unconstitutional and discharged a prisoner held under a warrant issued by a United States Commissioner for aiding and abetting the escape of a fugitive slave, and also discharged the same person from confinement after indictment and conviction in the United States District Court. This judgment of the Supreme Court of Wisconsin was reversed by the Supreme Court of the United States.

The same question was presented in *Tarble's Case*, 13 Wall. 397, where a soldier in the United States Army was discharged on habeas corpus by a supreme court commissioner of the State of Wisconsin on the ground that he had been unlawfully enlisted while a minor without the consent of his guardian.

In both cases the courts of the State were declared by the Supreme Court of the United States to have been without jurisdiction.

The fundamental proposition upon which the *Ableman* and *Tarble* cases rest is that no State has power to obstruct a Federal officer in the discharge of his duties. It is true, as was argued in the *Ableman* case, that the Supreme Court of Wisconsin had general jurisdiction to pass upon the constitutionality of the

fugitive slave law; it had power to do this in any proceeding which did not directly interfere with or arrest the functions of the Federal Government, but no State can lawfully do an act which will suspend the machinery of the Federal Government. As stated by the court in *Tennessee* v. *Davis*, 100 U. S. 257, 262—

> "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."

The principle of these cases would seem to apply to an attempt by the State to enjoin or restrain any Federal agency from the exercise of a right or the performance of a duty arising under a Federal statute.

> The right of Congress to determine to what extent a State court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to State control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by State legislative or judicial action, except so far as the lawmaking power of the Government may permit. [*Van Reed* v. *People's National Bank*, 198 U. S. 554, 557.]

Whether the Federal or State courts have jurisdiction in *quo warranto* proceedings against national banks was the subject of discussion in the case of *State ex rel Wilcox* v. *Curtis*, 35 Conn. 374, in which it was held that an information in the nature of a

quo warranto would not lie in a State court to try the right to the office of director in a national bank.

II.

CONSTITUTIONALITY OF SECTION 11 (K) OF THE FEDERAL RESERVE ACT.

(1) Every intendment is in support of the constitutionality of the act. The courts invariably hold that an act of Congress is constitutional unless its repugnancy to the Constitution is clearly apparent.

In the case of *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, the court says:

> In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears. (Citing *Nicol* v. *Ames*, 173 U. S. 509, 514, 515; *Gettysburg Park Case*, 160 U. S. 668, 680.)

See also *Hepburn* v. *Griswold*, 8 Wall. 603; *Legal Tender Cases*, 12 Wall. 457.

(2) It is well settled that Congress has the power to incorporate banking associations to be used as instrumentalities of the Government in the conduct of its fiscal affairs.

> *McCulloch* v. *Maryland*, 4 Wheat. 316, 401.
> *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 861.
> *Slaughter-House Cases*, 16 Wall. 36, 64.
> *Legal Tender Case*, 110 U. S. 421, 445.
> *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529.

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Mercantile Trust Co. v. *Texas and P. Ry. Co.*, 216 Fed. Rep. 225, 231.

Easton v. *Iowa*, 188 U. S. 220, 229.

Farmers' Nat. Bank v. *Dearing*, 91 U. S. 29, 33.

As stated by Chief Justice Marshall, in delivering the opinion of the court, in *McCulloch* v. *Maryland*, *supra* (p. 401):

> The first question made in the cause is, Has Congress power to incorporate a bank?
>
> It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.
>
> * * * * *
>
> The power now contested was exercised by the first Congress elected under the present Constitution.
>
> The bill for incorporating the Bank of the United States did not steal upon an unsuspect-

> ing legislature and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law.

This decision, which was affirmed and elaborated in the case of *Osborn* v. *U. S. Bank, supra,* has been uniformly followed by the later decisions of this court.

(3) The power to create carries with it the power to preserve. Congress may vest national banks with any powers it deems necessary to preserve the national banking system or the corporate entity of individual banks.

(a) The powers granted to such an association may be either public or private in nature.

This question was considered by this court when the constitutionality of the act of Congress creating the first Bank of the United States was before it. An effort was made at that time to sustain the contention that while Congress might have the power to incorporate a bank to be used as an instrument of the Government in the conduct of its fiscal affairs it could not vest corporations so created with the capacity to engage in private business, but could only authorize the exercise of functions to be performed for the Government.

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In discussing this question Chief Justice Marshall, in the case of *Osborn* v. *U. S. Bank, supra,* said (p. 860):

> The whole opinion of the Court, in the case of *McCulloch* v. *The State of Maryland,* is founded on, and sustained by, the idea that the Bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. *It is, undoubtedly, capable of transacting private as well as public business.* While it is the great instrument by which the fiscal operations of the government are effected, *it is also trading with individuals for its own advantage.* [Italics ours.]

It was contended in this case that a branch of the Bank of the United States doing business in Ohio was subject to tax under a law of that State which made it liable to an annual tax of $50,000 on each office of discount and deposit, because the operations of the bank were to a large extent of a private business character. To this argument the court replied (p. 863):

> The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the

> government are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the Nation for which it was created, and are, therefore, of the very essence of its character as national instruments. *The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions* of the government. Its corporate character is merely incident, which enables it to transact that business more beneficially. [Italics ours.]

Again (p. 864):

> Congress was of opinion that these faculties were necessary to enable the Bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of a national Legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed?

Again (p. 865):

> The court has already stated its conviction, *that without this capacity to trade with individuals*, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. [Italics ours.]

It is clear, therefore, that a banking corporation created by Congress may be vested with powers of a private nature to be used for its own advantage as well as with the power to perform public functions.

(b) Every banking association organized under Federal law since 1791 has been endowed with powers purely private in nature, which powers have been exercised for its own advantage in legitimate competition with other corporations.

When the first Bank of the United States was organized (1791) powers of the most general character were conferred upon it. It was enacted (Feb. 25, 1791, 1 Stat. 191, 192, c. 10) that a bank of the United States should be established with a prescribed capital stock, the subscribers to which were made a corporation, with power to take personal property, to sell and dispose of it, and to "put in execution such by-laws, ordinances, and regulations, as shall seem necessary and convenient for the government of the said corporation, not being contrary to law, or to the constitution thereof," and "generally to do and execute all and singular acts, matters and things, which to them it shall or may appertain to do" subject to the restrictions prescribed by the act. Those restrictions limited the real estate holdings of the bank, prohibited the purchase of public debts and trade in commodities, and limited the amount of indebtedness which could be incurred. The bank was thus clothed with general powers to transact a banking business subject to few restrictions.

The charter of the second United States Bank (1816) was of a similar broad and comprehensive nature. Act Apr. 10, 1816, 3 Stat. 266, 269, c. 44.

While the powers granted to national banks by the act of 1864 were more restricted than the powers granted to the first and second banks of the United

States, they were, nevertheless, intended to enable such associations to engage in the banking business to the same extent as other banking corporations organized at that time under State laws.

(c) These powers, though private in nature, need not be even incidental to the conduct of the Government's fiscal affairs. It is sufficient if they are necessary to the successful operation of the bank. The character of the powers and the degree of their necessity are matters of legislative discretion.

It is not essential that any particular power vested in a national bank shall be incidental or necessary to the conduct of the Government's fiscal affairs, but it is sufficient *if such power is, in the discretion of Congress, necessary to the successful operation of the bank.*

The court, in discussing further this question (*Osborn* v. *U. S. Bank, supra*), said (pp. 860, 861):

> The appellants endeavour to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.
>
> If there be anything in this distinction, it would tend to show that so much of the act *as incorporates the Bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional.* Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance

of the treasure of the Nation, if it be capable of being so employed, but can not breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a bank? This question was answered in the case of *McCulloch* v. *State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of the government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. *The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its suste-*

nance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. [Italics ours.]

It is clear Congress not only has authority to grant to na banks powers which in themselves are not incidental to the performance of a public function, but it is necessary that it should do so in order that the agency selected by it may efficiently serve the Government when called upon to render any public service.

When national banks were created the powers vested in them were designed to enable them to perform public services and to engage in private business for their own advantage. In their public capacity they may be used as fiscal agents of the Government, as Government depositories, and can and do help materially in the emission of currency and in the transfer of Government funds from one part of the country to another.

It is at once manifest, however, that if Congress had limited the powers of national banks to the exercise of these functions they could not have existed as corporations and hence could not have performed the services required of them.

The deposit of Government funds in a national bank designated as a depository involves an expense to the bank, which is required to pay interest on such deposits, and unless it is permitted to lend these funds to its customers it will receive no compensation for the service of acting as a Government depository.

Its revenue is earned from the use of its funds. It must, of necessity, derive its sustenance primarily from its banking operations conducted for its own advantage, as distinguished from its banking operations conducted as an agent or instrument of the Government, and since this is true those powers which are necessary to preserve and sustain the corporation are to that extent necessary to the Government, and the grant of such powers has been repeatedly held to be within the constitutional power of Congress.

That Congress in the exercise of reasonable discretion must determine what means are necessary to accomplish the proper execution of any power conferred on it by the Constitution, is settled beyond all dispute.

In the case of *McCulloch* v. *Maryland*, *supra*, when discussing the right of Congress to create the first Bank of the United States, the court says (p. 421):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution *must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end,

which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. [Italics ours.]

In the case of *Osborn* v. *U. S. Bank, supra* (p. 864):

> *Congress was of opinion that these faculties were necessary to enable the Bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national Legislature.* But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? [Italics ours.]

In *Knox* v. *Lee* and *Parker* v. *Davis* (*Legal Tender Cases*), 12 Wall. 457, 536, the court says:

> Indeed the whole history of the government and of congressional legislation has exhibited *the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed,* and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. [Italics ours.]

Again, in *Farmers' National Bank* v. *Dearing*, 91 U. S. 29, 33:

> The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch*

> v. *Maryland* (4 Wheat. 316) and in *Osborne* v. *The Bank of the United States* (9 id., 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. *They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.*
>
> * * * * * * *
>
> The power to create carries with it the power to preserve. The latter is a corollary from the former. [Italic ours.]

Again, in *Easton* v. *Iowa*, 188 U. S. 220, 238, the court says:

> *Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations.* [Italics ours.]

Applying this doctrine to the present case it seems clear that since the right to create and to preserve national banks has been established Congress in its discretion must determine what means are appropriate to that end and what powers should be conferred upon and exercised by national banks.

That the addition of the powers specified in section 11 (k) does not constitute an unreasonable exercise of this discretion, will appear from a consideration of the character of such powers.

(d) While it is not essential that the powers conferred be incidental to the ordinary banking functions, nevertheless the powers specified in section 11 (k) are, in fact, exercised quite generally by corporations which also exercise commercial banking powers and are similar in many respects to other corporate powers exercised by commercial banks, including national banks.

While Congress is given a wide discretion in determining what means shall be employed to preserve the integrity of the national banking system and the several national banks, and might, if it deemed necessary, vest in such banks powers not ordinarily exercised by banking corporations, in the present case the powers added are peculiarly appropriate to banking institutions.

It is probably true that at the time the national bank act was passed the right to act in the capacity of trustee, executor, or administrator was not regarded as a banking function nor as incidental to any banking power.

It is probably equally true, however, that this right was not then generally regarded as a corporate function at all, since the selection of corporations to act in fiduciary capacities is of comparatively recent development in this country. An individual rather than a corporation was then selected and this is still true in many sections of the United States. In so far as these powers have become functions of corporations, other than trust companies organized for the sole purpose of doing a trust business, they may be said to have been confined to that class of corporations the earnings of which are derived from the loan or investment of funds at interest and that they are more

nearly allied to the banking business than to any other.

It would be difficult to define with any degree of accuracy what constitutes "recognized banking powers," since there is little uniformity in the laws of the several States prescribing the powers which may be engaged in by banking institutions. A composite definition of banking, including an enumeration of the charter powers of banks organized under State laws, would include a very large proportion of all corporate powers, and it is this fact that no doubt influenced Congress in determining to extend the powers of national banks in order that they might be placed on a more nearly uniform basis with other banking institutions. In enlarging the powers of national banks, however, it added only those which have in the natural development of banking become incidental to this class of business.

The argument has been made that the relationship which exists between a national bank and its customer is ordinarily that of debtor and creditor; that this relationship differs from that of trustee and *cestui que trust*, and accordingly a national bank can not consistently be vested with the power to act as trustee or in any other fiduciary capacity.

It is somewhat difficult to appreciate the force of this argument when we consider that the relationships of "debtor and creditor," "principal and agent," and "trustee and *cestui que trust*" have been demonstrated by experience to be so interrelated as corporate functions and so frequently incidental each to

the other that it is the rule rather than the exception for the same corporation to act in each of these capacities.

Trust companies organized for the purpose of acting only in the capacity of fiduciaries have, as an incident of the performance of some trust function, become debtors or creditors of their customers. Beneficiaries of trust estates have found it advisable or convenient to leave on deposit with the trust company which acted as trustee their share of the proceeds of a distribution of an estate to be held subject to the order of the beneficiary and not for reinvestment by the trustee. In such case the relationship between the trust company and the beneficiary is changed from that of trustee and *cestui que trust* to that of debtor and creditor. It was probably due to a development of this practice that trust companies by a process of evolution gradually entered the field of what was popularly known as commercial banking. That is to say, having received deposits from those for whom they had acted as trustees and having thus been placed in funds held subject to the same conditions as demand deposits held by commercial banks, trust companies naturally sought investments in those short-term self-liquidating securities invested in by commercial banks. This was obviously necessary because the deposits so held were subject to check and were payable on demand. These demands could not be met in due course if such deposits were invested in those long-term securities in which trust

funds are ordinarily invested. The practice of receiving funds on deposit from beneficiaries of estates held in trust having proved remunerative to trust companies, it was natural that such companies should solicit similar deposits from others, thus increasing their earning power.

As the demand deposits of such companies increased, the demand on their part for short-term investments in commercial paper and other securities increased as a matter of course, thus bringing them into greater and more active competition with national banks.

The increasing activity of the trust companies in the general commercial banking business is clearly illustrated in one of the exhibits which accompanies the report of the Comptroller of the Currency made to Congress pursuant to the requirements of law for the year 1915. This exhibit, copy of which is printed as an appendix, *infra*, p. 63, consists of an analysis of the business of trust companies made up from reports furnished the comptroller by more than 90 per cent of the trust companies doing business in the United States. From this report it will appear that the aggregate deposits in trust companies have increased from $85,025,371 in 1875 to $4,216,017,244 in 1915. National bank deposits, according to the comptroller's report, increased during the same period from $696,652,020 to $6,611,218,000. The trust companies, therefore, held deposits in 1875 equal to about 12 per cent of the amount held by national

banks, while in 1915 the deposits in trust companies amounted to approximately 66 per cent of the deposits held by national banks.

While the trust-company deposits are not classified in this report until 1909, it will be observed that in 1915 demand deposits subject to check amounted to $2,652,323,201, whereas demand certificates of deposit aggregated $94,827,754, certified checks $,-787,783, and cashiers' checks $23,386,418. These figures indicate what a great proportion of the total demand deposits is of the kind formerly considered peculiar to the business of a commercial bank; that is, deposits subject to check without notice. They equal approximately 96 per cent of the total demand deposits of the trust companies exclusive of savings deposits which may be either demand or time deposits.

It thus appears that the commercial banking business has become so closely allied to the other activities of trust companies that it may be said now to be incidental to the business of a trust company.

On the other hand, commercial banks, even prior to the passage of the Federal Reserve Act, were at times required to assume trust relations as an incident of their business.

They not infrequently came into the possession of funds impressed with a trust. For example, in the case of *American Can Co.* v. *Williams*, 178 Fed. Rep. 420, it was held that when sight drafts attached to bills of lading were delivered to a national bank for

collection and remittance the relation of trustee and *cestui que trust* undoubtedly existed.

Again, in the case of *Boone County National Bank* v. *Latimer,* 67 Fed. 27, where a bank received a note for collection and remittance, but credited proceeds, this was held to be a clear breach of trust—a diversion of a trust fund. See also:

Richardson v. *Olivier,* 105 Fed. Rep. 277.
Richardson v. *New Orleans Coffee Co.,* 102 Fed. Rep. 785.
Wallace v. *Stone,* 107 Mich. 190.
The Drover's National Bank v. *O'Hare,* 119 Ill. 646.
Massey v. *Fisher,* 62 Fed. Rep. 958.
Montagu v. *Pacific Bank,* 81 Fed. Rep. 602.

The powers specified in section 11 (k) of the Federal Reserve Act appear, therefore, to be more nearly incidental and more closely related to the business of banking than to that of any other class of corporations, except those organized solely for the purpose of acting in fiduciary capacities. Such powers do not differ materially from other powers vested in national banks.

Under the provisions of the National Bank Act, banks may receive deposits; may discount notes, drafts, bills of exchange, and other evidences of debt; may lend money on personal security and may make such investments of their funds as are permitted by the National Bank Act. All of these operations are conducted in their private capacity and for their own advantage. They necessarily involve trading with per-

sons and dealing in property within the borders of a State.

The relation created is contractual whether funds are received on deposit subject to investment by the national bank in accordance with the laws of the United States or whether such funds are received in trust subject to investment according to the provisions of the instrument creating the trust or the laws of the State which relate to the administration of the trust estate. But without the aid of section 11 (k) national banks are confined to trusteeships which result from the operation of law while their competitors—trust companies and many State banks—may voluntarily act in the capacity of fiduciaries and at the same time may compete with national banks in the more limited field of commercial banking.

That there is no inconsistency in combining in one corporation fiduciary powers and commercial banking powers is abundantly illustrated by an analysis of the State laws relating to the incorporation of financial institutions.

(c) The laws of 44 of the 48 States and also of the District of Columbia provide for the formation of corporations with authority to exercise both fiduciary powers and commercial banking powers.

An examination of the laws of the various States shows that though there were very few corporations of any kind possessing fiduciary powers prior to the passage of the National Bank Act in 1864, at the present day the laws of every State in the Union authorize corporations to exercise certain trust

powers and in *44 of the 48 States the laws permit a single corporation to exercise not only fiduciary powers but also commercial banking powers.*

Whether commercial banks are allowed to exercise trust powers or trust companies are allowed to exercise commercial banking powers is, for the purpose of this discussion, immaterial. The point to be considered is the competitive force given to a single corporation endowed with both classes of powers. It was that fact which Congress was under the necessity of considering and which not only justifies the action of Congress in giving trust powers to national banks but which made such action imperative.

The court's attention is directed to the fact that in the following States corporations may, upon compliance with various rules and regulations dependent upon the laws of each State, exercise at one and the same time both fiduciary powers and general banking powers:

> Alabama: Code of 1907, sections 3518 and 3524.
>
> Arizona: Civil Code, 1913, sections 284–305.
>
> Arkansas: Section 2, act of April 13, 1903, (banking powers limited to buying and selling all kinds of stocks, bonds, negotiable and non-negotiable paper, and other investment securities, and to receiving monies in trust and paying interest on same).
>
> California: California bank act of March 1, 1909, as amended May 6, 1913, section 22.

Colorado: Revised Statutes 1908, section 305, subdivisions 7 and 10.

Connecticut: Laws 1913, chapter 194, section 8.

Delaware: Special acts of legislature incorporating trust companies authorize the exercise of banking powers.

District of Columbia: 31 United States Statutes, chapter 854, subchapter eleven, sections 715 to 748.

Florida: Act of June 5, 1911, section 3, chapter 6425, Laws of Florida.

Georgia: Code, 1914, section 2817.

Idaho: Session Laws, 1911, chapter 124, section 20.

Illinois: Section 1, chapter 16a of Hurd's Revised Statutes of Illinois, 1915–1916.

Indiana: Laws of 1915, chapter 97.

Iowa: Code of Iowa, Supplement, 1913, section 1889d, page 683.

Kansas: Laws of 1907, chapter 425.

Kentucky: Kentucky Statutes, 1915, section 612a.

Louisiana: Act 45, Laws of 1902, page 59.

Maine: Laws of 1907, chapter 96, page 93.

Maryland: Special acts of legislature incorporating trust companies authorize the exercise of banking powers.

Massachusetts: Chapter 116, Revised Laws, 1902, sections 12 and 13.

Minnesota: General Statutes, 1913; sections 6409, 6416, 6417. Banking powers exercised by trust companies are considerably restricted.

Mississippi: Section 263, Mississippi Code, 1906, as amended by chapter 125 of the acts of 1914.

Missouri: Laws of 1907, article XII, section 5, pages 135 and 136.

Montana: Revised Code, 1907, title 2, chapter 2, sections 3927, 3928, 3930, and 3937.

Nevada: Revised Laws of Nevada, 1912, section 620.

New Hampshire: Special acts of legislature incorporating trust companies authorized the exercise of banking powers. Laws 1915, chapter 109, section 34, prohibit any corporation, national or State, from acting as administrator or executor.

New Jersey: Laws of 1899, chapter 174, section 6.

New Mexico: Laws of 1915, chapter 67, sections 2 and 3.

New York: Laws of New York, 1914, volume 2, chapter 369, Article V, section 185.

North Carolina: Revised Laws, 1908, sections 222, 228, 228a.

North Dakota: Civil Code, chapter 22, sections 4682 and 4689; Laws of 1903, chapter 195, section 1.

Ohio: Laws of 1908, page 269, house bill 833, sections 1 and 4.

Oklahoma: Session Laws of 1908, chapter 6, house bill 615, Article I, section 3.

Oregon: General Laws, 1913, chapter 354, section 4.

Rhode Island: Laws of 1908, chapter 1590, section 46.

South Carolina: Acts of 1903, act 37.

South Dakota: Compiled Laws, 1913, vol. 2, p. 128za; chapter 225, Laws of 1911.

Tennessee: Shannon's Code, 1896, sections 2090–2100; Code Supplement, 1904, sections 3217–3273.

Texas: McEachin's Civil Statutes Ann., 1913, vol. 1, article 380.

Utah: Compiled Laws of 1907, chapter 9, section 424.

Vermont: Acts of 1910, No. 158.

Virginia: Special acts of legislature incorporating trust companies authorize the exercise of banking powers.

Washington: Section 3349 of Remington & Ballinger's Codes and Statutes.

West Virginia: Acts of 1903, chapter 7, section 1.

Wyoming: Revised Statutes, 1899, section 3085.

It will be observed that the only States not included in this list are Michigan, Nebraska, Pennsylvania, and Wisconsin. In many of the 44 States which are listed above State banks and, in some of them, even national banks are expressly authorized by the State laws to do a trust business; in others the State law provides for the formation of joint banks and trust companies, and in the majority of them the law expressly authorizes trust companies to do a general banking business. The result in all cases, however, is a single corporation, whether called a bank, a trust company, or a bank and trust com-

pany, possessing the power to do both a commercial banking and trust business.

(f) In order to compete successfully with corporations organized or operating under State banking laws, national banks must be given powers substantially similar to those enjoyed by such State corporations. It was therefore not an unreasonable exercise of its discretion for Congress to determine that the powers of national banks should be enlarged by the addition of those specified in section 11 (k) of the Federal Reserve Act.

When the act of 1864 became a law a national bank organized under that law was authorized (13 Stat. 101), to exercise by its board of directors, or duly authorized officers or agents, subject to law—

> all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this act.

The genesis of the legislation creating national banks, as well as the subsequent course of such legislation, is consistent only with the theory that Congress intended that these banks should have in general powers similar to those exercised by other banking institutions organized under State laws. The words quoted were not intended as a limitation upon the incidental powers appropriate to a banking business but were intended to confer in broad outline the usual banking powers.

Commenting upon this clause, Mr. Justice Rapallo, in *Pattison* v. *Syracuse National Bank*, 80 N. Y. 82, 89, said:

> That the enumeration of banking powers contained in the act of 1864 was not significant of an intention to place any special restriction upon national banks, as distinguished from State banks, is apparent from the fact that it is a *usual formula, descriptive of the banking business, contained in bank charters* (Charter of Commercial Bank of Albany, Laws of 1825, p. 198; Dutchess Co. Bank, id., p. 204), and is almost identical with that contained in the general banking law of 1838 (Laws of 1838, p. 249, Sec. 18) which provides that "such association shall have power to carry on the business of banking by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange in the manner specified in this act; by loaning money on real and personal security, and by exercising such incidental powers as shall be necessary to carry on such business." The meaning of the two provisions is the same, and their language is the same, except in the order of arrangement. In both, the business of banking is defined, that is, discounting paper, receiving deposits, etc., and all powers incident to these general banking powers are added. In the act of Congress the frame of the sentence is that national banks shall exercise all such incidental powers as shall be necessary to carry on the business of banking, and then follows

> a description of the banking business, while in the act of 1838 the banking business is first described and the grant of incidental powers follows. The enumeration in the act of Congress is not of the incidental, but of the principal powers, and to them are superadded all incidental powers.

Since that time a number of powers and privileges have been conferred upon State institutions so that the powers enumerated in section 5136 R. S. above quoted can no longer be said to constitute the "usual formula, descriptive of the banking business, contained in bank charters."

Congress has found it necessary from time to time to modify the restrictions imposed upon national banks in order to enable them to compete successfully with State institutions. For example, by the act of June 22, 1906, 34 Stat. 451, c. 3516, it permitted national banks to lend to one person, firm, or corporation an amount equal to 10 per cent of the capital and surplus of the lending bank instead of an amount equal to 10 per cent of its capital. By the act of March 14, 1900, 31 Stat. 45, 48, c. 41, it authorized the incorporation of banks with $25,000 capital under certain conditions, thus reducing the minimum amount ($50,000) required before the passage of this act. By the act of June 20, 1874, 18 Stat. 123, c. 343, it amended section 5191 R. S., so as to require no reserve to be carried against circulation, thus increasing the lending power of such banks.

Prior to the passage of the Federal Reserve Act, however, Congress had not in any sense kept pace with State legislatures in the extension of corporate banking powers and the discrepancy between State banking powers and national banking powers had become a source of serious concern to those engaged in the banking business under national charters.

When section 9 was incorporated in the Federal Reserve Act, giving to State banks and trust companies the right to obtain the benefits of the Federal reserve system, this discrepancy became a matter of even more serious moment, since it deprived national banks of certain advantages which up to that time had served to offset to some extent the broader powers enjoyed by State banks and trust companies. State banks becoming members of the Federal reserve system under section 9 of the act are entitled to the privilege of obtaining Federal reserve notes and of rediscounting commercial paper. They may be designated as Government depositories by the Secretary of the Treasury and enjoy practically all of the privileges of national banks except the privilege of issuing circulating notes against the security of Government bonds, and this is largely offset by the privilege of obtaining Federal reserve notes.

With these faculties added to the advantages already enjoyed by reason of the broader corporate powers of State banks and trust companies, it became imperatively necessary for Congress, in order to preserve the integrity of the national banking system and of

the banks composing this system, to enlarge to some extent the competitive powers of national banks by giving them rights and privileges somewhat similar to those already enjoyed by competing State corporations.

In addition, therefore, to extending the corporate powers of national banks by authorizing them (1) to increase their loaning power (section 19, Federal Reserve Act), (2) to loan money under certain restrictions on the security of real estate (section 24, Federal Reserve Act), and (3) to accept drafts or bills of exchange based on the exportation or importation of goods (section 13, Federal Reserve Act), Congress also provided that, with the permission of the Federal Reserve Board, such banks should have the right to act as trustee, executor, administrator, and registrar of stocks and bonds (section 11 (k), Federal Reserve Act), in order to enable them to compete with those State corporations which possess both fiduciary and commercial banking powers. By an amendment to the act, approved September 7, 1916, 39 Stat. 752, Congress has attempted to still further coordinate the powers of national banks and those created and organized under State laws, (1) by authorizing national banks to accept drafts and bills of exchange in certain domestic transactions (section 13, as amended); (2) by authorizing banks under certain conditions to subscribe to stock of banks engaged in international or foreign business; (3) by permitting banks to lend on city real estate under certain conditions and subject to certain restrictions; (4) by permitting

those banks located in places of less than 5,000 inhabitants to act as the agent for insurance companies and as broker or agent for others in making loans under certain prescribed conditions.

The burden of showing that Congress has exceeded its powers in enacting section 11 (k) into law rests upon the defendants in error, and (assuming for the moment that there is no question of the delegation of legislative authority) unless proven affirmatively to the satisfaction of the court that Congress has grossly exceeded its discretion in determining that the powers conferred by section 11 (k) are necessary to the successful operation of the national banking system, it is respectfully submitted that there is no basis for the contention that this section is unconstitutional and void.

It is to be noted that, notwithstanding this burden is upon defendants in error, they have failed to present any evidence to indicate that Congress abused its discretion in determining that fiduciary powers were necessary adjuncts to the operations of national banks at the present time.

(4) Section 11 (k) has a direct relation to the underlying purpose of the Federal Reserve Act, to wit, the creation of a new basis for nonmetallic currency, to be supported by a cohesive banking system which should include a majority of the banks of the United States, and insure a currency stable in character and elastic in volume.

While it is in no sense necessary under the decisions of this court that the private powers granted to

national banks should be related or incidental to the public functions performed by such banks, nevertheless the grant of powers specified in section 11 (k) was in fact an appropriate means selected by Congress not only of insuring to banks composing the Federal reserve system an adequate supply of commercial paper to be used as security for Federal reserve notes, but also of establishing the system itself upon the broadest basis of membership. It was designed both to protect banks within the system from unequal competition which might destroy their allegiance, and to induce those without the system to enter it. One of the purposes of the act, which is aided by section 11 (k), was the creation of a new basis of nonmetallic currency to be supported by a cohesive banking system, such system to include a large majority instead of a minority of the banks of the United States as at present. This new system, while insuring by appropriate safeguards the stability of notes circulating as currency, will also provide for elasticity in its volume. In this view the grant of these powers is directly connected with an important governmental function, namely, the creation of a uniform, sound, and stable currency system. An analysis of the purposes of the Federal Reserve Act will show the relation of section 11 (k) to the new currency system. Such an analysis makes necessary a brief review of the history of currency legislation and a consideration of some of the defects of the financial system which the Federal Reserve Act was intended to correct.

(a) The currency system created by the National Bank Act was made necessary by lack of uniformity and by instability of the State bank note.

After the liquidation of the second bank of the United States in 1836 the fiscal affairs of the Government were conducted without the aid of any banking institution organized under the laws of the United States until the national banking system was created at the close of the Civil War. Collections and disbursements of Government revenues during this period were made in specie. As stated by White in "Money and Banking," 5th ed., p. 107:

> Prior to the Civil War the fiscal operations of the Government were transacted exclusively with coin, by its own officers, without the intervention of banks.

The nonmetallic currency of the country then consisted of the notes issued by State banks. The grave hardships of that system—to the Government and the people at large—are a matter of common knowledge.

In the stress of the Civil War, when the Government was under the necessity of borrowing large sums of money and the people at large were struggling with the evils of a depreciated paper currency, consisting of United States notes and notes of some 1,400 State banks, some good and more bad, the national bank system was created.

This system was in brief the incorporation of a number of banks under national charters and under Federal supervison which were authorized to engage

in a general banking business in the several States. Each of these national banks was permitted to issue its bank notes, uniform in character, against and based upon an equal amount of United States bonds owned by the banks but deposited with the Treasurer of the United States as collateral security for the notes issued. Two of the main purposes of the act which brought this system into existence were to create an enlarged market for United States bonds and to establish in the country at large a uniform and reliable nonmetallic currency. As stated by this court in *Tiffany* v. *Nat. Bank of Missouri*, 18 Wall. 409, 413:

> National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country and in part to create a market for the loans of the General Government.

The same idea is expressed in other cases. See *Merchants Nat. Bank* v. *United States*, 214 U. S. 33, 42; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154.

While the national bank note was issued and permitted to circulate under appropriate safeguards designed to insure its stability, so long as several hundred State banks placed their notes in circulation, without these safeguards, it was of course impossible to bring about uniformity in the value of this form of currency. Accordingly, on July 13, 1866, 14 Stat. 98, 146, c. 184, Congress found it necessary to pass an act which placed a prohibitive tax on all circu-

lating notes of State banks. This act drove many of the State banks into the national system—just as Congress intended.

In sustaining the constitutionality of this act this court said in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549:

> Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactment, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

It was argued in this case that the act was unconstitutional because the amount of the tax indicated a purpose on the part of Congress to destroy a franchise of the State banks. The court in discussing this point said (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is therefore beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial cannot prescribe to the legislative departments

> of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

The initial failure of the system of national bank currency came from the fact that the State banks continued to do the main banking business of the country and to be the main handlers of currency. The success of the system was expedited by the statute above referred to, which put the State banks out of business as banks of issue and thus left in circulation only those notes which were issued and redeemed under appropriate safeguards.

(b) Experience has demonstrated that while the National Bank Act provided a uniform and stable currency system it lacked elasticity and was otherwise defective.

In the period following the Civil War, and particularly in the period from 1885 to 1913, difficulties developed in the national banking system.

The first difficulty lay in the fact, clearly understood by the banking community, that the currency was not sufficiently elastic. Inasmuch as it was based on a nonelastic basis, *i. e.*, the United States bonds owned by the banks, there was no way in which the bank-note currency could quickly and easily adapt itself to the varying demands for a proper circulating

medium—as, for instance, in crop-moving periods, when there was need for a much greater amount of currency. (See Holdsworth's "Money and Banking," pp. 330, 331.)

A second defect in the national banking system was the immobility of bank reserves—due to rigid reserve requirements by which each bank kept its metallic reserve against liabilities in its own vaults or with some other bank in the large cities. The result of this system of scattered reserves was that in times of financial stress and falling prices there were likely to occur currency panics, which paralyzed the credit of the whole country and demoralized prices and markets. At such times each bank, selfishly fearing for its own position, hoarded currency and at the very worst of times called loans, with the inevitable result of shaking public confidence in the soundness of the country's financial institutions. This was demonstrated in the panic of 1907. It is needless to describe in detail these currency panics peculiar to the United States. They were rightly attributed to the lack of cohesion in our banking structure and illustrated the worst defect of our currency and banking system.[1]

[1] The reports which accompanied the introduction of the Federal Reserve Act in both the House and Senate show how keenly Congress was alive to to these difficulties.

Thus the House report (H. Rept. No. 69, 63d Cong., 1st sess., p. 4) states: "In view of the lack of any factor of unity the national banks have failed to furnish to the Nation as a whole a single and powerful system of credit. The strength of the credit situation in each community has depended upon the strength of the banks there situated, and, except in times of stress, has even in these communities been measured by the strength not of the strongest, but of the weakest institution there located."

The Senate committee was unable to agree on details and reported the House bill without recommendation. (S. Rept. No. 133, pt. 1, 63d

In Paine's National Banking Laws, seventh edition, at page 18, it is said that—

> Within the last fifty years our country has had six panics, namely, 1873, 1884, 1890, 1893, 1901 and 1907.
>
> There is no question but that, to a material degree, these panics resulted from defects in our system of banking.

In addition to these inherent defects the constantly increasing activities of trust companies in the field of commercial banking had proven a serious menace to the national banks. From 1895 to 1907 there had

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Cong., 1st sess.) The views of the members of the committee were printed as parts 2 and 3 of the report. The report states (pt. 2, pp. 7, 8):

"Both sections of the committee, however, agreed on the great fundamentals of the bill—that is:

"First. On the necessity for greater concentration of the banking reserves of the country.

"Second. The volume of such reserves.

"Third. The volume of the capital of the proposed banks.

"Fourth. The mobilization of such reserves.

"Fifth. The promotion of an open discount market.

"Sixth. The provision for an elastic currency; the issuance of Federal reserve notes.

* * * * *

"The chief purpose of the banking and currency bill is to give stability to the commerce and industry of the United States, prevent financial panics or financial stringencies; make available effective commercial credit for individuals engaged in manufacturing, in commerce, in finance, and in business to the extent of their just deserts; put an end to the pyramiding of the bank reserves of the country and the use of such reserves for gambling on the stock exchange.

"In order to accomplish these results there are certain great fundamentals recognized by all experts as essential and necessary, to wit:

"First. The proper concentration of the bank reserves of the country under the control of the banks themselves, safeguarded by governmental supervision.

"Second. A suitable banking capital as a margin of safety.

"Third. Placing the larger part of the Government funds with such banks, where they may be used in the service of the national commerce.

"Fourth. Authorizing the issuance of elastic currency against liquid commercial bills under proper safeguards." * * *

been an enormous and, as compared with the national banks, a disproportionate growth in the commercial banking business done by trust companies which were outside the national bank system. They shared, and still share, banking predominance with the largest and strongest national banks. The result was that by 1913 the trust companies had become the "department stores of finance." (Holdsworth's "Money and Banking," p. 295.)

It was therefore evident that any new banking system which sought to check currency panics like the panic of 1907, by joining the sound commercial banking institutions of the country together, could not leave out of consideration the trust companies which had become such important factors in this field of activity.

(c) The Federal Reserve Act is designed to remedy these defects while preserving uniformity and stability.

In order to remedy these defects in our financial system the Federal Reserve Act provides for (*a*) the creation of a new basis of issue of circulating notes, (*b*) for the mobilization of banking reserves, and (*c*) for the inclusion of State banks and trust companies in the Federal reserve system.

Under the Federal Reserve Act the country is divided into 12 districts. The national banks of each district are compelled to contribute a certain proportion of their capital to form a strong Federal reserve bank, the resources of which are conserved primarily for the member banks of that district. Any member bank

may at any time take to its Federal reserve bank sound, short-time commercial paper (which it has discounted for the business community), indorse it, and rediscount it with the Federal reserve bank.

The Federal reserve bank may deposit this paper with its Federal reserve agent (the local representative of the Federal Reserve Board) as security for an issue of Federal reserve notes, and upon setting aside a gold reserve equal to 40 per cent of the amount of commercial paper deposited may obtain Federal reserve notes equal in amount to 100 per cent of the commercial paper deposited. These notes, which are obligations of the United States, are a new form of currency redeemable ultimately by the Federal reserve bank but which are backed by the credit of the United States.

By the scheme thus generally outlined, which is carried on under the supervision of the Federal Reserve Board, a new basis of currency is provided. These notes, instead of being issued against United States bonds, as the national bank notes are, are based upon, and the amount of them is measured by, the commercial paper received by the member banks in the ordinary course of their so-called private business and rediscounted with the Federal reserve banks. Thus, under the new system, because the member bank can always transform its sound commercial paper into currency at the Federal reserve bank, it is expected that the amount of currency out-

standing will, as in other countries, automatically vary with the demands of business and will be immediately obtainable at any time it may be needed by the banks.

The volume of Federal reserve notes issued must necessarily depend upon the volume of commercial paper obtainable from member banks.

It is therefore apparent that, in so far as the State banks and trust companies remain outside the Federal reserve system, by so much the Federal reserve system must fail in furnishing a completely elastic currency.

Holdsworth in his "Money and Banking," article 198, p. 383, says, under the heading "State banks and the new law":

> One of the requisites of banking reform outlined in the previous chapter was solidarity—and unity—of the whole banking system. Since there are at present nearly three times as many banks operating under state charters as national banks it can be seen that this desideratum can not be attained unless a large proportion of the state banks enter the new system.

To make the new currency basis efficient it should ultimately include all the sound commercial banks of the country, and to avoid the currency panics, such as the panic of 1907, all the sound commercial banks as opposed to the speculative institutions of the country should be united and their credit and re-

serves mobilized through the Federal reserve system. The Federal Reserve Act by admitting State banks and trust companies to membership makes them Federal agencies for regulating the currency.

(d) Section 11 (k) is a necessary factor in providing a more elastic currency and in insuring stability of the new currency system provided by the act.

It follows from this review that section 11 (k) is not an unrelated phrase, flung in to please some national bank stockholder so that he may make more profit; it is not simply a scheme to increase the private faculties and private business of the national banks, but it too has a real place and part in the scheme of the Federal Reserve Act. Undoubtedly it tends to enlarge the powers of the national banks, and tends to invade the fields of activity of the State trust companies. Our opponents see in that its vice; on the contrary it is a constitutional justification.

Section 11 (k) is obviously an important factor in the creation of a new basis of currency issue. It is necessary to offset the invitation to State banks and trust companies to join the system. If trust companies become member banks they receive all the advantages of membership in the system, including the stability and standing that comes from Federal supervision and the ability to obtain currency through their Federal reserve banks—and since they already enjoy broader corporate powers than national banks, will become still more dangerous competitors

unless the powers of national banks and trust companies are more nearly coordinated.

On the other hand, even if trust companies do not, in large numbers, join the Federal reserve system (and as a matter of fact they have not), nevertheless, unless the powers of national banks are enlarged in order that they may compete with the trust companies which remain outside of the Federal reserve system these trust companies will continue their growth and the gradual acquisition of the commercial banking business of the country at the expense of the national banks. If this process goes on for the next 10 years as it has in the last 20, then in 10 years the Federal reserve system may fail or break in a panic—just because the basis of the currency will have become not the commercial paper of the country but only a small part of it, and because there will again be lacking the necessary cohesion among the main banking institutions of the country.

A successful and sound plan to regulate the currency of a country must have the cooperation of the predominant financial institutions of the country which are engaged in loaning money and credit. The true purpose of section 11 (k) is to cordinate the powers of national banks and trust companies so that trust companies shall not, by their success and power outside the Federal reserve system, continue such a menace to the system as to curtail its usefulness.

It may be unimportant to the Federal Government whether or not national banks make any considerable profit from the trust business so long as the profits earned from all sources are sufficient to sustain them and to enable them to perform satisfactorily their public functions. It is important, however, to the Government that national banks shall continue banking preeminence, and shall continue to do their share of the commercial banking business. To retain banking preeminence it is most important that the national banks should be able to offer to the general public the same conveniences (as to execution of trusts) afforded by their chief rivals, the trust companies, the "department stores of finance."

The fact that the trust companies have an enormous advantage in gaining commercial banking business is made evident in several ways. First, the stockholders of national banks of the large cities have in many instances united to form a trust company to be operated by the same officers which operate the bank—and have thus practically started trust departments, but with the necessary handicap of maintaining a separate organization. Second, it is notable that some of the States in order to protect their State banks against the competition of the trust companies (operating under the laws of the same State) have permitted their banks to exercise some or all of the functions of trust companies.

This is true of Illinois, Georgia, Idaho, and Nevada. (See statutes, *supra*, pp. 28–31.) The same course has been followed in the laws of New Zealand and England. The Federal Government in granting trust powers to national banks by section 11 (k) is simply protecting the banks against trust company competition in the way which the States themselves have pointed out.

It is in the light of that history and those purposes that we must consider the constitutionality of section 11 (k) as a part of a complete scheme wisely adopted by the National Government to regulate the currency of the country, and to protect commerce between the States from the destructive effect of recurrent panics.

(5) The section is not a delegation of legislative authority. The Federal Reserve Board is not empowered to permit any national bank to exercise any fiduciary power not enumerated in section 11 (k). Its power is administrative, not legislative.

The second ground of demurrer assigned by defendants in error was—

> Because, even if Congress itself possessed the authority to confer upon national banks the corporate powers specified in said section 11 (k), it cannot lawfully delegate such authority to the Federal Reserve Board.

It was argued that Congress by this section has not granted any powers to national banks, but has undertaken to delegate to the Federal Reserve Board the power to legislate on this subject.

This contention was not passed upon by the Supreme Court of Michigan (R. 15, 22). It was, however, expressly declared unsound by the Supreme Court of Illinois in *People* v. *Brady*, 271 Ill. 100, the court saying (p. 104):

> The legislation granting the power was that of Congress; the decision as to what banks the legislation was applicable was delegated to the Federal Reserve Board.

The Illinois court called attention to the fact that the constitutionality of acts delegating administrative power to boards, commissions, or individuals has often been before the courts and as often upheld, citing, among others, the familiar cases of *Field* v. *Clark*, 143 U. S. 649, 694, and *United States* v. *Grimaud*, 220 U. S. 506.

A long line of recent cases exemplifies the law on this point. It is well settled that Congress need not prescribe in detail its legislative policies. It is sufficient if a general rule is laid down. Where the situation dealt with by the legislature is complex, and the applications of the law must vary according to circumstances, great discretion to fill in the details may be vested in the administrative officers. "If this were not so," said Mr. Justice McKenna in *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 246, "the many administrative agencies created by the state and National Governments would be denuded of their utility and government in some of its most important exercises become impossible."

The legislative rule prescribed for administrative action in *Buttfield* v. *Stranahan*, 192 U. S. 470, was merely the fitness and purity of the tea sought to be imported; that in *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, was the unreasonable obstruction to free navigation. In *St. Louis Ry.* v. *Taylor*, 210 U. S. 281, it was held that the height of drawbars on freight cars could be fixed by the Interstate Commerce Commission. In the *Intermountain Rate Cases*, 234 U. S. 476, wide discretionary powers of the Interstate Commerce Commission to fix rates under the long and short haul clause of the Interstate Commerce Act were sustained. The Ohio Board of Censors were held to have power to determine what are "moral, educational, amusing, and harmless" films in *Mutual Film Co.* v. *Ohio Industrial Commission*, 236 U. S. 230,. Again, it seems impossible to distinguish the case at bar from the Ohio Blue Sky Law case, in which it was held proper to prohibit engaging in the sale of stocks and bonds unless the Commissioner of Banks and Banking was satisfied that the applicant for license was of good repute. *Hall* v. *Geiger-Jones Co.* (No. 438, Oct. Term, 1916), opinion rendered January 22, 1917. A similar case is *Merrick* v. *Halsey* (No. 413, Oct. Term, 1916), opinion rendered January 22, 1917, in which the Michigan Blue Sky Law Commission was empowered to approve securities listed in any standard manual thereby exempting them from operation of the law.

See also *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Interstate Com. Comm.* v. *Goodrich Trans. Co.*, 224 U. S. 194; *Kansas City So. Ry. Co.* v. *United States*, 231 U. S. 423.

Numerous cases uphold the right of the legislature to clothe a commission with capacity to determine the conditions precedent upon which corporate rights created by the legislature are exercisable. *State* v. *R. R. Commission*, 137 Wis. 80; *State* v. *Kenosha E. R. Co.*, 145 Wis. 337, 347.

In the present case the congressional rule is as fully defined as the circumstances will permit. National banks are to have the power to act as executor, administrator, and trustee only when not in contravention of the State or local laws, and when the particular bank is the proper institution to act in the fiduciary capacity. The definite standard is the State law and the fitness of the bank. The banks which may apply are many, and their circumstances varied. Higher capitalization or a larger surplus may be necessary in some communities than in others. The banks in the Federal reserve system, moreover, constitute one single system under the general business and governmental supervision of the reserve board. Discretionary power is appropriately vested in their general managers.

As said in the *Merrick* case, *supra*, it is presumed that the reserve board will do its duty. But if there ever is arbitrary action, relief may be had in the courts. (p. 9.)

(6) Neither the granting nor the exercise of the powers in question involves any invasion of the sovereign rights of the States. The opinions of the Illinois and Michigan courts in this regard are based upon a manifest misapprehension of the effect of the exercise of these powers.

In declaring section 11 (k) unconstitutional, the Supreme Court of Illinois, like the Supreme Court of Michigan, reached the conclusion that when Congress undertook to vest trust powers in national banks it invaded the rights of the States. *People* v. *Brady*, *supra*. It is somewhat difficult, however, to determine from either opinion in just what way the rights of the States are supposed to be invaded. The powers specified in the act can not be exercised except "when not in contravention of State or local law," and so no conflict can arise as between any State law and the Federal statute under consideration. The right of a State to legislate on the subject of trust estates is not impaired nor affected. The administration of State laws is in no way interfered with. No State is deprived of any control over persons or corporations acting as trustees, executors or administrators within its borders. Congress has merely vested in national banks the capacity to act when selected by the parties in interest and when permitted by State or local law. It has expressly given to the State the right to place national banks in the class of those under disability.

It would seem, therefore, that the Illinois and Michigan courts have concluded that national banks

vested with trust powers may invade the field of activity of trust companies and that such an invasion constitutes an invasion of the "sovereignty of the States" because trust companies are created by the States. Such a contention is merely a revival of the argument that no Federal agency can be vested with any private power. It is at once manifest that the same argument would apply with equal force to an invasion by national banks of the field of commercial banking, since State banks which engage in this class of business are likewise created by the States. While this appears to be the only basis for the contention that there has been an invasion of the rights of the States, even this theory is not consistent with other parts of the opinions of the Illinois and Michigan courts since both courts concede the right of Congress to create national banks and to vest them with private powers. The underlying thought in both opinions appears to be that in some vague and indefinite way national banks, if vested with trust powers, may prove a menace to the State's control over property within its borders and for this reason the act is unconstitutional.

The Illinois court held that the exercise of trust powers by national banks would contravene the laws of that State. That part of the decision, therefore, which declared section 11 (k) unconstitutional was in the nature of dicta. It might be assumed that under these circumstances it would not have deemed it

necessary to consider the constitutional question involved unless it was apparent that Congress grossly abused its authority. An analysis of the opinion, however, makes it clear that there were no facts before the court indicating any such abuse.

It will be observed that after conceding that Congress had the right to grant trust powers to national banks "if they were reasonably necessary to the efficiency of such corporations for the purposes of their creation as governmental agencies," the court says (p. 110):

> It not being shown such added powers are now necessary to the further success of such purposes * * * we think the act, in so far as it attempted to confer such powers upon national banks, is unconstitutional and void.

It thus appears that the court recognizes that Congress is vested with a discretion in this matter, but contrary to the ordinary rules of evidence, sustained by a long line of decisions of this court, it held that the burden was on the respondent, now plaintiff in error, to show that Congress had not abused this discretion, and not on the relators, now defendants in error, to show that Congress had exceeded its constitutional powers. In other words, it presumed the act to be unconstitutional and in support of its position contended that Congress itself could not have believed these powers to be necessary to national banks because it left it to the banks to determine whether or not they should be exercised. If this test should be

applied to all corporate powers of national banks it would be difficult to sustain the constitutionality of any.

It should be borne in mind that in order to obtain the right to exercise the powers specified in section 5136 R. S., to which the Illinois court referred, it is necessary for those forming an association to comply with certain statutory conditions, which include the filing of an organization certificate with the Comptroller of the Currency; that whenever any corporation so organized desires to change its name, to increase or reduce its capital stock, to change its location, or in anywise to alter or amend its charter, an application must first be made to the Comptroller of the Currency and must be approved by him.

Congress might have provided for a similar procedure on the part of national banks desiring to have trust powers added to their other corporate powers. Inasmuch, however, as the penalty prescribed by section 2 of the Federal Reserve Act for the violation of any of the provisions of that act is to be enforced under the direction of the Federal Reserve Board, it was entirely consistent with the purpose and intent of the act to have application made to the board and not to the comptroller for the addition of the powers in question.

The Michigan court likewise concedes the right of Congress to create national banks and to vest them with private powers. Unlike the Illinois court, it

holds that "undoubtedly, all presumptions are in favor of the constitutionality of the Act in question here and Congress is the judge, within the exercise of its powers, of the functions a national bank should perform" (R. 22).

The court does not suggest that any evidence has been submitted or considered tending to show that Congress has abused the discretion which it recognizes, but in holding the act unconstitutional says (R. 22):

> But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that Congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the State * * *. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency.

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It thus appears that the sole justification for concluding that Congress has abused its discretion in granting to national banks the powers specified in section 11 (k) is an assumption on the part of the court that some natural connection exists between what it terms the business of banking and the fiscal operations of the Government and that none exists between the business of trust companies and the Government's fiscal operations. The court does not point out how any particular private power heretofore exercised by national banks has a closer relationship to the fiscal operations of the Government than the private powers in question.

It is an interesting fact that the reason assigned for its conclusion that Congress has no power to grant trust powers to national banks is substantially similar to one of the reasons advanced by the opponents of the first Bank of the United States against vesting that bank with any private powers.

As illustrating the similarity between the arguments made at that time and the reasoning of the Michigan court in the present case, it will be observed that in the case of *McCulloch* v. *Maryland, supra*, page 364, counsel for defendants in error stated that a banking corporation "in its proper and natural character * * * is a commercial institution, a partnership incorporated for the purpose of carrying on the trade of banking," and, continuing, said: "But what natural connection is there between the collec-

tion of taxes and the incorporation of a company of bankers?"

The contention was renewed by counsel in *Osborn* v. *U. S. Bank*, 9 Wheat. 733, whereupon the Chief Justice, in passing upon the point raised, said (pp. 860–862):

> The appellants endeavour to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.
>
> If there be anything in this distinction, it would tend to show that so much of the act *as incorporates the Bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional.* * * *
>
> * * * *The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life.* * * *
>
> *This distinction, then, has no real existence.* [Italics ours.]

No more striking illustration can be given of the real issue involved in the present case.

It would have been useless to concede the right of Congress to create a corporation to be used as an agency of the Government but to deny its right to endow this agency with those faculties which are necessary for its existence and support.

By analogy, it is equally useless to concede the right of Congress to endow such an agency with faculties which a half century ago were sufficient to enable it to live and to perform the functions for which it was created, but to deny the right of Congress to add such new powers as may have been made necessary by changed conditions to enable it to meet the increasingly active competition of corporations created and organized under State law.

In the last analysis, the question to be determined is, Has Congress the power to preserve the national banking system? If it can give to national banks powers similar to those enjoyed by their competitors, the national system can be preserved and the banks composing this system can continue to perform the public services for which they were created. On the other hand, if the legislative discretion of Congress is determined to be so limited that it can not coordinate the powers of national banks, State banks, and trust companies, it is inevitable that sooner or later the national system will disintegrate and those who have embarked upon the banking business will seek their charters from that sovereignty which offers the wider field of activity and the more certain source of revenue.

CONCLUSION.

The decision of the Supreme Court of Michigan should be reversed and the cause remanded with instructions to dismiss the information.

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MARCH, 1917.

APPENDIX.

COPY OF TABLE INCORPORATED IN REPORT OF THE COMPTROLLER OF THE CURRENCY MADE TO CONGRESS FOR THE YEAR 1915.

Classification of loans, other investments and deposits, together with the amount of capital, surplus and profits, and aggregate liabilities of loan and trust companies for each year from 1875 to 1915, inclusive.

Year.	Number.	Loans.				Investments.					
		Secured by other real estate (including mortgages owned).	Secured by collateral other than real estate.	All other loans.	Total loans.	United States bonds.	State, county, and municipal bonds.	Railroad bonds.	Bonds of other public-service corporations.	Other bonds, stocks, warrants, etc.	Total investments.
1875	35				$65,900,174	$2,086,842				$37,323,062	$39,409,904
1876	38				76,608,647	16,491,646				18,847,238	35,338,884
1877	39				67,946,390	19,805,685				17,960,260	37,765,945
1878	35				59,303,327	19,445,460				17,296,237	36,741,697
1879	32				61,171,877	17,948,856				16,892,230	34,841,086
1880	30				74,675,537	19,109,650				18,544,695	37,654,345
1881	31				101,906,566	15,631,573				17,426,054	33,057,627
1882	32				132,054,203	16,934,812				25,878,256	42,813,068
1883	34				140,022,358	17,437,990				30,322,420	47,760,410
1884	35				158,018,009	23,371,084				27,879,858	51,250,942
1885	40				141,542,649	25,376,400				29,750,200	55,126,600
1886	42				156,828,458	27,985,658				43,816,716	71,802,374
1887	58	$16,269,993	$36,544,018	$143,282,819	196,096,830	28,787,717	$178,148	$7,400,348		36,561,529	72,927,742
1888	120	46,606,390	175,033,893	20,060,365	241,700,648	22,899,766	2,006,479	15,702,430		31,970,238	72,578,913
1889	120	53,349,945	193,610,054	44,491,268	291,450,367	27,193,201	3,765,747	19,352,398		26,413,671	76,725,017
1890	149	56,669,834	209,617,297	61,595,409	327,882,540	24,921,203	2,993,365	26,102,410		41,690,518	95,707,496
1891	171	65,072,641	225,012,238	66,791,541	356,876,420	16,057,015	3,828,397	29,771,125		44,316,784	93,973,321
1892	168	55,098,822	256,413,894	73,760,832	385,273,548	18,059,578	6,404,311	27,617,700		54,125,189	106,206,778
1893	228	81,288,973	307,170,395	74,270,229	462,729,597	18,486,636	5,842,753	11,639,330		92,856,182	128,824,901
1894	224	58,149,211	233,662,562	82,609,940	374,421,713	13,449,411	5,728,331	11,166,307		111,880,102	142,224,151
1895	242	50,294,477	221,022,813	162,069,171	433,386,461	39,607,593	3,767,198	5,849,131		127,862,623	177,086,555
1896	260	70,612,944	249,874,349	141,513,656	462,000,949	37,400,637	5,243,292	12,464,537		146,056,085	201,164,551

1897	251	63,643,137	236,044,125	145,942,463	445,629,725	39,097,761	7,677,933	8,706,430	.....	145,645,896	201,128,020
1898	246	92,175,473	303,790,563	143,196,409	539,162,445	34,186,440	6,449,871	14,626,194	.....	138,715,247	193,977,752
1899	260	43,640,072	303,173,568	252,217,393	599,031,033	29,595,770	6,489,823	12,450,197	.....	217,551,083	266,086,873
1900	290	49,965,197	402,763,092	275,223,848	727,952,137	1,863,255	7,399,672	10,439,090	.....	306,139,069	325,841,086
1901	334	59,579,122	607,868,759	272,321,010	939,768,891	2,099,021	10,428,652	21,980,385	.....	361,714,796	396,222,854
1902	417	87,252,612	693,371,795	411,863,904	1,192,488,311	1,594,219	12,594,287	17,975,068	.....	415,417,116	447,580,690
1903	531	94,836,041	830,243,159	378,158,000	1,303,237,200	2,920,082	15,568,451	21,676,001	.....	539,295,165	579,459,699
1904	585	110,004,189	655,276,770	382,324,598	1,147,605,557	1,167,777	19,646,092	32,791,004	.....	613,906,142	667,511,015
1905	683	144,394,593	965,617,090	439,274,979	1,549,286,662	1,902,430	17,657,332	31,606,449	.....	736,752,224	787,918,435
1906	742	166,524,402	895,884,351	547,059,086	1,609,467,839	1,678,160	17,305,806	46,592,846	.....	694,708,668	760,285,420
1907	794	174,235,578	823,109,861	604,018,798	1,601,364,237	1,280,592	11,239,601	31,823,413	.....	741,656,064	785,999,670
1908	842	153,727,485	821,341,681	404,412,308	1,379,481,474	555,303	89,639,659	29,576,312	.....	656,103,997	775,875,271
1909	1,079	377,318,280	1,222,881,129	460,550,859	2,060,750,268	3,222,380	155,647,931	362,404,241	$168,589,933	789,239,579	1,459,104,064
1910	1,091	369,161,435	1,230,282,986	655,016,724	2,254,461,145	1,271,940	144,495,162	312,518,321	159,294,782	924,661,469	1,542,241,674
1911	1,251	467,531,456	1,289,452,721	668,650,649	2,425,634,826	2,224,692	187,123,910	371,707,846	212,593,716	341,128,520	1,114,778,684
1912	1,410	526,509,702	1,279,983,539	900,350,885	2,706,844,126	5,985,094	202,293,176	380,190,967	208,673,579	421,996,627	1,219,139,443
1913	1,515	576,334,682	1,374,332,681	813,018,379	2,763,685,742	2,770,183	113,563,277	297,324,766	334,294,978	443,066,425	1,191,019,629
1914	1,564	[1] 565,435,248	1,367,365,957	968,947,309	2,901,748,517	3,396,028	210,817,736	395,314,294	224,715,658	427,101,410	1,261,345,128
1915	1,664	[1] 643,388,896	1,401,021,422	1,000,969,080	3,045,279,399	2,138,054	241,160,288	401,071,546	232,451,914	472,792,053	1,349,613,857

[1] Includes loans secured by farm lands.

COPY OF TABLE INCORPORATED IN REPORT OF THE COMPTROLLER OF THE CURRENCY MADE TO CONGRESS FOR THE YEAR 1915—Continued.

Classification of loans, other investments and deposits, together with the amount of capital, surplus and profits, and aggregate liabilities of loan and trust companies for each year from 1875 to 1915, inclusive—Continued.

Year.	Number.	Capital stock.	Surplus.	Deposits.							Aggregate resources and liabilities, respectively.
				Individual deposits subject to check without notice.	Savings deposits or deposits in interest or savings department.	Demand certificates of deposits.	Time certificates of deposits.	Certified checks.	Cashier's checks outstanding.	Total deposits.	
1875	35	$21,854,020	$6,967,693							$85,025,371	$122,890,175
1876	38	21,535,490	8,288,825							87,817,992	127,646,179
1877	39	22,347,440	7,164,673							84,215,849	123,612,499
1878	35	22,086,611	7,925,303							73,136,578	110,843,603
1879	32	21,101,876	7,714,316							75,873,219	111,809,936
1880	30	18,501,876	6,191,935							90,008,008	126,869,673
1881	31	19,188,800	6,881,809							111,670,329	156,544,079
1882	32	21,553,718	8,356,302							144,841,596	194,985,825
1883	34	22,778,175	8,812,723							165,378,515	212,342,587
1884	35	23,938,600	10,191,544							188,745,922	239,871,691
1885	40	26,428,600	10,695,984							188,417,293	248,389,683
1886	42	27,644,150	21,671,152							214,063,415	278,314,591
1887	58	36,355,769	15,841,793							240,228,795	319,125,657
1888	120	53,243,510	24,105,371							257,878,114	383,653,477
1889	120	59,445,937	25,583,905							299,612,899	441,268,483
1890	149	70,676,247	34,594,751							336,456,492	503,801,336
1891	171	79,292,889	38,412,197							355,330,080	536,628,202
1892	168	80,645,972	45,824,747							411,659,996	600,244,908
1893	228	94,867,268	50,403,421							486,244,079	726,664,506
1894	224	97,068,092	57,663,599							471,298,816	705,186,944
1895	242	108,963,905	64,179,611							546,652,657	807,063,041
1896	260	111,146,973	62,444,553							586,468,156	855,282,153
1897	251	106,968,253	68,825,967							566,922,205	843,713,745
1898	246	101,228,555	70,658,684							662,138,397	942,462,179
1899	260	104,308,722	79,707,194							835,499,064	1,071,525,994

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VERTICAL IN

1900	290	126,930,845	112,650,803								1,028,232,407	1,330,160,343
1901	334	137,361,704	119,609,186								1,271,081,174	1,614,981,605
1902	417	179,732,581	149,902,172								1,525,887,493	1,983,214,707
1903	531	232,807,735	222,208,091								1,589,398,796	2,298,554,063
1904	585	237,745,488	254,604,398								1,600,322,325	2,380,287,747
1905	683	243,133,622	281,289,339								1,980,856,737	2,865,976,479
1906	742	268,384,337	348,236,524								2,008,937,790	2,959,230,534
1907	794	276,146,081	369,286,668								2,061,623,035	3,071,419,360
1908	842	278,408,759	370,145,308								1,866,964,314	2,865,632,876
1909	1,079	362,703,223	351,699,101	[1]$1,839,023,559	$576,783,099	$91,802,209	$299,880,277	$17,862,855	$10,483,178	2,835,835,180	4,068,534,982
1910	1,091	367,333,556	432,718,233	1,893,159,336	624,601,126	63,056,649	308,782,477	27,609,760	19,465,141	3,073,122,706	4,216,850,061
1911	1,251	385,782,933	400,406,067	2,069,328,509	813,745,937		372,279,171	20,393,328	20,108,947	3,295,855,895	4,665,110,868
1912	1,410	418,985,771	424,313,939	2,319,055,959	910,850,167		395,983,407	16,658,017	32,030,686	3,674,578,238	5,107,444,382
1913	1,515	452,386,839	445,285,028	[2]2,448,240,038	970,855,018		323,824,531	13,854,105	18,413,956	3,575,187,650	5,123,920,197
1914	1,564	462,201,248	446,569,442	[3]2,448,085,497	1,034,906,721	147,714,057	268,135,415	20,373,876	31,138,042	3,950,353,610	5,489,531,037
1915	1,664	476,806,240	450,675,447	[4]2,652,323,201	1,053,569,572	94,827,754	377,122,514	14,787,783	23,386,418	4,216,017,244	5,873,120,341

[1] Includes $12,869,939 unclassified deposits.
[2] Includes $3,826,647 postal savings deposits.
[3] Includes $10,546,512 postal savings deposits.
[4] Includes $11,420,836 postal savings deposits.

MAR 6 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR.

vs.

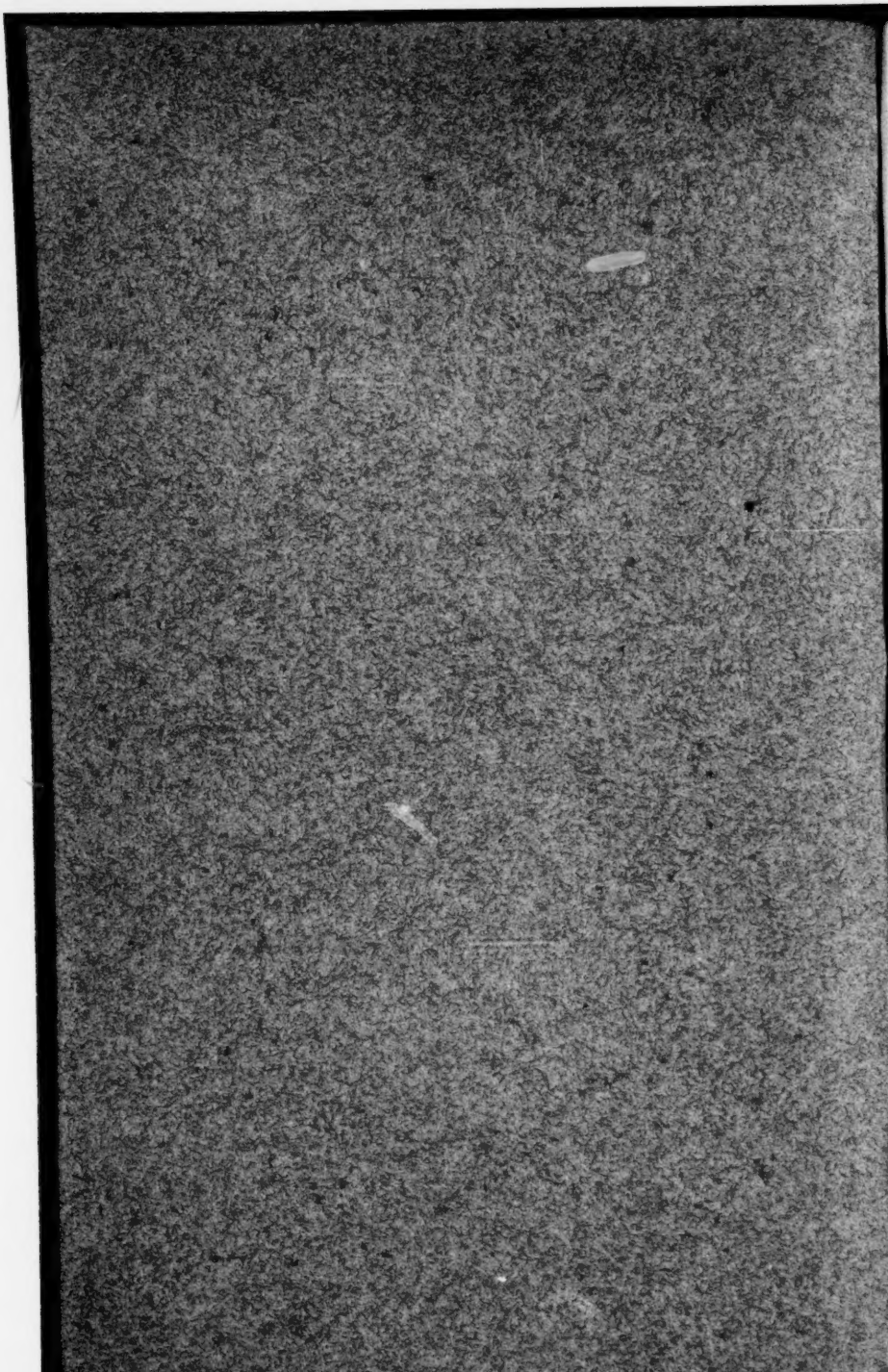
GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

In Error to the Supreme Court of the State of Michigan.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD S. CLARK,
Counsel for Plaintiff in Error.
Bay City, Michigan.

25,594.



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vs.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

POINT I.

CONSTITUTIONAL POWERS OF CONGRESS.

(c) Implied Powers and the Congressional Discretion.

The brief for defendant in error merely amplifies the reasoning of the Supreme Court of Michigan, which was based upon a misconception of the nature of the tests to be applied to legislation of this nature. The argument that our theory would permit the unreasonable extension of the congressional powers, by adding incidental power to incidental power *ad infinitum,* overlooks the fact that this process is

necessarily limited by the limitations of the subject under consideration. The most minute sub-division of a given subject does not enlarge its scope. So long as each step in the process has a logical connection with the preceding step, there is no danger of final transgression beyond proper bounds.

We have argued merely for the recognition of a Congressional discretion in respect to the *means and methods* of effectuating powers already recognized.

(d) The Nature of Trust Companies.

The cases of

Mercantile Bank v. N. Y., 121 U. S., 138, and
Jenkins v. Neff, 186 U. S., 230.

(cited on page 11 of brief for defendant in error) were decided when the powers of trust companies in the State of New York were very limited. The Mercantile Bank case was decided in 1887 and the Jenkins case in 1902. The first enlargement of the powers of trust companies in New York was by an amendment of the New York banking law adopted in 1893 which authorized trust companies "to exercise the powers conferred on individual banks and bankers by Section 55 of this act, subject to the restrictions contained in said section."

Chapter 696, Laws of 1893.

Section 55 referred to, provided as follows:

> "Every bank and individual banker doing business in this state may take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum, and such interest may be taken in advance, reckoning the days for which the note, bill, or evidence of debt has run."

It was not until 1914 that the New York legislature ma-

terially extended the powers of trust companies in New York by giving them power.

> "To discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt; buy and sell exchange, coin and bullion; lend money on real or personal securities; and to receive deposits of moneys, securities, or other personal property from any person or corporation upon such terms as the company shall prescribe."
>
> Sec. 185, Banking Law of 1914.

The two cases cited must therefore be construed with reference to the statutes in force at the time of their decision. Under any construction, they do not support the position of defendants in error in the present case.

In Mercantile Bank v. New York, the point involved was whether the methods used by the State of New York in taxing shares of stock in national banks violated the section of the revised statutes providing that state taxation of national bank shares should not be at a greater rate than that assessed upon other moneyed capital. In support of the contention that national bank stock was unfairly taxed, reference was made to the method of taxing trust companies. The court was distinguishing between banks and trust companies merely to the extent necessary to show that there might be a reasonable discrimination in the rate of taxation. The principal point emphasized was the fact that the rate of taxation of national bank stock should be compared with the rate of taxation of the stock of state banks, and that this was a fairer comparison than that between national banks and trust companies. The court merely said that those companies were not banks "in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce." This language did not mean that trust companies, even then, were not banks in some other sense of the word. The language which immediately follows shows that the trust companies under consideration were banks of deposit, as such banks are defined in the Oulton and Field cases. Mr. Justice Matthews said:

> "They receive money on deposit, it is true, and invest it in loans, and so deal, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the Act of Congress."

The real ground of the decision was not any distinction between banks and trust companies, but was the conclusion finally reached that there was no real discrimination between national banks and trust companies, so far as the rate of taxation was concerned.

Jenkins v. Neff, 186 U. S., 230, involved the same basic question as the case last cited. It was attempted to evade or distinguish the decision in the Mercantile Bank case by relying upon the 1893 amendment to the New York statute above mentioned. The court held that this new legislation did not have the effect claimed, and that there had been no new legislation calling for any qualification of the decision in the Mercantile Bank case. In holding that there was no unlawful discrimination, the court pointed out the difference between the statutory requirements in regard to the investment of the capital of national banks and trust companies, arguing that these differences might reasonably support some differences in the rate and method of taxation. The language quoted by counsel was designed merely to illustrate some of the differences between trust companies and other banking corporations as bearing on the propriety of discrimination in respect to the rate and manner of taxation. The court was not arguing that banks and trust companies were essentially or vitally different, but merely that there was a difference in the primary purposes of their organization. No one would attempt to deny this fact, but it is of no greater significance in the case at bar than the fact that there may be a difference between the primary purposes of the organization of a national bank and of a savings bank designed for philanthropic purposes. It is not the primary object in the minds of the incorporators which is the controlling question in the case at bar. Neither is the case controlled by any superficial differences between trust companies as commonly organized and banks as commonly or-

ganized. Mr. Justice Brewer's opinion in Jenkins v. Neff, (p. 237), recognized the propriety of investing trust companies "with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the state." It is equally proper to invest banks with some of the powers of trust companies, as an inducement to perform the other duties and obligations imposed by congress. If the conferring of banking functions upon trust companies does not make them banks, neither does the conferring of trust company functions upon banks make them trust companies. The distinction between identity and similarity must be kept in mind. The two classes of corporations, although entirely distinct, are essentially similar.

(e) There Is No Invasion of State Rights.

The claimed exclusive jurisdiction of the several states over persons and property within their territory, begins only where the federal jurisdiction ends. The power of the federal government, is confined within certain definite channels, but within those channels it is absolute and paramount. If any legislation is concerned with a proper subject of federal activity, the nature of the private property or interests affected cannot be considered as invalidating it.

Questions involving national banks, or interstate commerce, or any of the other great branches of federal activity are completely within the control of Congress, and, in case of conflict, both state rights and private rights must give way. It is therefore entirely misleading to argue that there are certain private rights and privileges which as such are beyond the control of Congress. If they are beyond the control of Congress, it is not because they involve the internal affairs of the states, or the private rights and privileges of their citizens, but solely because they do not happen to be included within any of the constitutional powers of the federal government.

Using, as an illustration, the power of Congress over national banks, we find that whenever there is any real conflict, both state laws, and private rights must give way.

"The states can exercise no control over them, nor in anywise affect their operation except in so far as Congress may see proper to permit." It was so held in regard to the application of state usury laws.

Farmers, etc., Bank v. Dearing, 91 U. S., 29.

The subjects referred to in Section 11-k are no more "peculiarly matters for state regulation" than is the question of the amount of interest which citizens of the various states can be compelled to pay on their private loans from national banks, or the protection by the states of their citizens from the enforcement of usurious contracts. Yet in respect to these matters the state laws must give way, except as they have been confirmed and re-enacted by act of congress. To argue that any matter is purely a subject of state regulation because of the nature of the interests affected is begging the question. The test is to be found not in the effect of the legislation on the state or its citizens, but in the subject of the legislation, as being included in or excluded from the great subjects over which congress is given jurisdiction. The control of national banks is one of these subjects, and any incidental feature of this control derives its validity from the fact that it is such a feature, regardless of the nature of the private interests affected. The cases cited by counsel for defendant in error are not in conflict with our position.

Pennoyer v. Neff, 95 U. S., 714, did not involve any conflict between state and federal authority. The language quoted was not intended to sustain the authority of the state as against that of the federal government, but to protect each sate against unlawful interference with its citizens by the governments of other states.

Overby v. Gordon, 177 U. S., 214, merely followed the rule of Pennoyer v. Neff, in a case still more unlike the case at bar. The question decided was that "the sovereignty of the State of Georgia and the jurisdiction of its courts did not extend to and embrace property not situated within the territorial jurisdiction of the state." (P. 222.)

Brown v. Fletcher's Estate, 210 U. S., 82, was another case which limited state, not federal, authority. A Massachusetts judgment was held unenforcible against a Michigan estate.

U. S. v. Fox, 94 U. S., 320, involved a devise of real estate to the federal government. The court held that the state statute limiting the devise of real estate to corporations, would control, as "the title and modes of disposition of real property within the state * * * are not matters placed under the control of federal authority."

Michigan Trust Company v. Ferry, 228 U. S., 353, again involved a mere question of the extra-territorial effect of judicial proceedings in the state courts.

Dickinson v. Seaver, 44 Mich., 624, merely held that "No administration is extra-territorial" and that "no judgment can be enforced outside of the jurisdiction rendering it"; also that a federal decree could not interfere with state probate proceedings. No question affecting the power of Congress was in any way involved.

Lafferty v. Bank, 76 Mich., 35, merely determined the rights and liabilities arising from the giving of a residuary legatee's bond. The questions at issue in the case at bar were not even remotely involved.

American Missionary Association v. Hall, 138 Mich., 247, merely denied the power of a Probate Court of Ohio to remove a Michigan executor.

Not one of the above decisions is in point in the case at bar. None of them established "the right of the state to exclusive jurisdiction over property within the state." (See brief for defendant in error, page 13.) If this sweeping doctrine were established, nothing would be left of the rule exempting national banks and other federal agencies from state interference. Counsel's argument proves too much. If it is sound, the national bank act must give way to state legislation, in all cases of conflict, and the case of Farmers Bank v. Dearing, 91 U. S., 29, and the many other cases up-

holding the paramount power of Congress over all federal agencies must be overruled.

We disagree with counsel that the subjects covered by section 11-k are "peculiarly matters for state regulation." We see no logical difference in this respect between these, and the other purely private functions of national banks. The handling of a trust fund, or of an estate, or the holding of a trust mortgage is no more a private or personal transaction than the receipt of funds on deposit, the issuance of certificates of deposit, the discounting of commercial paper, or the loan of funds on collateral security. The distinctions sought to be made are purely arbitrary.

Moreover, Section 11-k expressly avoids any possible conflict with the state sovereignty by permitting the application of the section only when it is "not in contravention of state or local law." This constitutes a voluntary abdication by Congress in cases of conflict, where its authority would otherwise be paramount.

POINT II.

Regulatory Legislation.

If the provisions made by Congress for regulating the exercise of the powers conferred by Section 11-k are still incomplete, that it is matter for Congress to remedy. The incomplete exercise of any lawful power does not destroy its legality.

The claimed assumption of exclusive authority by the states raises in a disguised form, the question whether the provisions of Section 11-k are "in contravention of state law,"—a question which was of course finally decided by the Supreme Court of Michigan. The Illinois court (in People v. Brady, 271 Ill., 100) also confused this question with that of the "invasion of state rights." The two are

in fact entirely distinct. The question of the "invasion of state rights" involves only the question whether Congress is legislating in regard to a proper subject of federal legislation. The question of "contravention" involves the question whether the actual carrying into effect of this legislation has resulted or will result in a conflict of laws. The subject of the act of Congress here involved is merely the enlargement of the corporate *capacities* of national banks.

It is an extraordinary claim that any legislative body except Congress itself, is concerned with this subject. We think that counsel confuse the question of the capacity of a national bank to act as fiduciary, with that of the wisdom of its selection or its proper qualification to act as such in a particular case.

In Michigan the mere fact that national banks are, and always have been subject to the supervision of the Comptroller of the Currency, has never made their business an unlawful one from the point of view of the state authorities, and this fact will remain true even if trust functions are added to the functions previously exercised by such banks.

Congress by the enactment of Section 11-k, did not intend to and could not compel the appointment of a national bank as a fiduciary in any case, but merely authorized such appointment. The result was merely to broaden the field of choice of the appointing court or person.

To whatever extent the Probate Courts of the State may have exclusive jurisdiction in such matters, such jurisdiction would not be impaired by the mere addition of another class of corporations which might be considered at the option of those interested in the appointment of executors and administrators. The application of Section 11-k would therefore not interfere with any feature of the state Probate Court jurisdiction or procedure.

The state has passed laws governing the state banks which are fully as elaborate as the so-called trust company act. The national banks are operating in entire disregard of these laws and yet neither the state banks, nor the state

government, nor the citizens of the state are injured thereby. The fact that there might be some incidental difference between the regulations prescribed by the state for trust companies and the regulations prescribed by the federal government for national banks would be of no greater importance to the persons dealing with each than are the present differences between the state and federal methods of regulating the banking business.

The construction and effect of the state laws are disposed of by the opinion of the Supreme Court of Michigan in the present case.

Mr. Justice Ostrander, speaking for the majority (Rec., pp. 20-21), said:

> "There is, therefore, no State policy opposed to corporate trustees, executors or administrators. No corporation, and for that matter no individual, can in any event act in any of the capacities indicated except by appointment. And a corporation, or an individual, in such relations, is governed by the laws of the State and the orders of State courts.
>
> "National banks are, and are not, foreign corporations. They are creatures of congress, agencies of the federal government, domesticated in the state. They may sue and be sued in the courts of the state, but the powers they shall possess, their management and control are beyond state authority, except that a bank like the respondent may not exercise certain powers—cannot lawfully possess them—in contravention of state law.
>
> "No state law is contravened—opposed, come into conflict with—because a corporation exercises the indicated powers, nor by the act of congress creating national banks. The legislature has not declared that national banks in this state shall not have the right 'to act as trustee, executor, administrator, or registrar of stocks and bonds.'
>
> "* * * To say that because the legislature has required certain things of a domestic corporation as a condition to the exercise of the right and cannot re-

quire the same, or similar, things from national banks, therefore the exercise of the right by national banks will be in contravention of state law, seems to me to be an unsound argument. The bank is here, with such structure as Congress has given it, and Congress has in terms declared that among other functions it may perform that of a trustee, etc., if any body wants it to. The mere element of safety of a fund is a matter to be considered by those applying to the corporation to take charge of it, or by the court making an appointment. That one may regard the domestic corporation as the safer institution is not evidence that the other, if it acts, acts in contravention of state law. Certain safeguards surrounding the execution of trusts, etc., by domestic corporations are lost when individuals are appointed to execute them. The individual does not therefore act in contravention of state law.

"Mr. Justice Brooke does not point out in what way, if respondent acts within its apparent powers, the operations of any state law governing trusts, or the settlement of estates, will be interefered with. I am not content to rest so important a decision upon a doubtful inference."

POINT III.

Delegation of Legislative Powers.

The cases cited by relators' counsel are not controlling. The reasoning of these cases might be applicable if Section 11-k had given to the Federal Reserve Board the right—

> "to grant by special permit to national banks applying therefor such additional rights, powers and privileges as the board may approve."

Such an unlimited delegation of authority would, doubtless, be void. Section 11-k, however, delegates no such au-

thority, but merely leaves to the board some administrative discretion in respect to certain definitely specified powers. The primary authority to exercise these powers comes from the statute which enumerates them, not from the board which merely administers the statute.

The following quotations from some of the decisions cited in our original brief furnish a complete answer to counsel's contentions.

> "From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations, not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it would give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done."
>
> "* * * But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."
>
> *U. S. v. Grimaud,* 220 U. S., 506 (517-8).

> "We see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. * * * The authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority. (Citing cases), and by this court the delegation of such power even to a single individual is sustained in Wilson v. Eureka

City, 173 U. S., 32, and Gundling v. Chicago, 177 U. S., 183.

Fischer v. St. Louis, 194 U. S., 361 (372).

"It is not too much to say that a denial to Congress of the right under the constitution to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be to 'stop the wheels of the government' and bring about confusion, if not paralysis in the conduct of public business."

American Bridge Co. v. U. S., 204 U. S., 364 (387).

Respectfully submitted,

EDWARD S. CLARK,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FIRST NATIONAL BANK OF BAY CITY, plaintiff in error,
v.
GRANT FELLOWS, ATTORNEY GENERAL of the State of Michigan, on the relation of Union Trust Co. et al.

No. 764.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

The following memorandum of State legislation since the passage of the Federal Reserve Act is submitted in accordance with leave obtained in the course of the oral argument.

JOHN W. DAVIS,
Solicitor General.
JOSEPH P. COTTON,
MILTON C. ELLIOTT,
Counsel.

MARCH, 1917.

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I.

STATUTES AUTHORIZING NATIONAL BANKS TO DO TRUST COMPANY BUSINESS.

COLORADO, Laws 1915, ch. 48, p. 135–7, "An Act relating to banks and bankers," approved April 12, 1915, provides:

> SEC. 7. Every National Bank, now or hereafter carrying on business in this state, when authorized by special permit granted by the Federal Reserve Board, in conformity with the provisions of an Act of Congress approved December 23, 1913, and known as the "Federal Reserve Act," shall possess, enjoy and exercise the following rights, privileges and powers and be authorized to act in the capacities of trustee, executor, administrator and registrar of stocks and bonds, and in such other fiduciary or trust capacities as may now or hereafter be permitted by the laws of the United States or by the rules or regulations of said Federal Reserve Board.

INDIANA, Laws 1915, ch. 97, p. 310, "An Act granting fiduciary powers to duly organized banks," approved Mar. 8, 1915, provides:

> That every person, firm or corporation transacting a banking business subject to the provisions of an act entitled, "An act to regulate and supervise the business of banking by individuals, partnerships or unincorporated persons," approved March 8, 1907; and every

corporation transacting a banking business as prescribed in, "An act to authorize and regulate the incorporation of banks of discount and deposit in the State of Indiana," approved Feb. 7, 1873, and all acts amendatory or supplemental thereto, and every national bank coming within the United States federal reserve act shall be empowered by this act to accept and execute trusts of any and every description which may be committed or transferred to them, under the same rules and regulations as now govern like powers in loan and trust companies. * * *

IOWA, Supplemental Supplement, Code, 1915, ch. 12–A, "Of additional powers conferred upon Trust Companies, State and Savings Banks," section 1889–d, par. 9, p. 150, provides:

> When so authorized by any law of the United States now in force or hereafter enacted, national banks may exercise the same powers and perform the same duties as are by this section conferred upon trust companies, state and savings banks.

Power to act as executor, administrator, trustee and registrar is conferred by paragraphs 1, 2, 3, 4, 5, 6 of sec. 1889–d upon "trust companies, state and savings banks."

MASSACHUSETTS, ch. 233, Acts 1915, p. 228, "An Act relative to the taxation of National Banks," approved May 8, 1915, provides:

Section 1. Every national bank located in this commonwealth which now is or hereafter

may be empowered to act as trustee and in such capacity to hold personal property shall, annually, between the first and tenth days of April, make a return to the tax commissioner, signed and sworn to by some officer of the bank, of all personal property held upon any trust on the first day of April, whether such property is held by said bank singly or jointly with others, which would be liable to taxation if held by any other trustee residing in this commonwealth, the name of each city and town in this commonwealth where any beneficiaries resided on said day, the aggregate amount of such property then held for all the beneficiaries resident in each of such places, and also the aggregate amount held for beneficiaries not resident in this commonwealth. Every such bank shall annually pay to the treasurer and receiver general a tax to be assessed by the tax commissioner upon the total value of such personal property held in trust at the rate determined by him under the provisions of section six of chapter one hundred and ninety-eight of the acts of the year nineteen hundred and fourteen.

OHIO, Laws 1914, "An Act To grant additional powers to banking corporations organized under the laws of Ohio and to amend section 9764 of the General Code," p. 185–6, section 9796–3, approved Feb. 17, 1914:

No state bank or national bank shall act as administrator, executor, trustee or registrar of stocks and bonds in this state. Provided, however, that trust companies organized under

the laws of Ohio shall have the same powers in the acceptance and execution of trusts which are now conferred upon them by law, and other state banks and national banks may have the same powers in the acceptance and execution of trusts which are now conferred by law upon trust companies, upon such state banks and national banks complying with all the requirements, regulations, and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts.

SOUTH DAKOTA, Laws 1915, ch. 105, p. 224, "An Act relating to National and State Banks to act as trustee, executor or administrator of stocks and bonds," approved March 6, 1915:

It shall be lawful for National banks when authorized by the laws of the United States to act as trustee, executor or administrator of estates or trusts or as registrar of stocks and bonds. Provided, further that State banks may act in similar capacity under such rules and restrictions as the Department of Banking and Finance may prescribe.

VERMONT, Laws 1915, ch. 157, p. 259, "An Act to authorize the appointment of National banks to positions of trust," approved April 2, 1915:

Section 1. To the extent that the laws of the United States permit, any national bank located and doing business in this state may be appointed and act as executor of a will, codicil or writing testamentary, as administrator with will annexed, as administrator of a person

deceased, as receiver, as assignee, trustee or guardian of a person subject to guardianship, under the same circumstances, in the same manner and subject to the same control by the court having jurisdiction, as a natural person legally qualified.

VIRGINIA, Laws 1915, ch. 29, p. 52, "An Act to extend to national banks the rights, powers, privileges, and immunities conferred upon trust companies under an act entitled an act to provide how trust companies may be incorporated, and to provide for general powers for the purpose of doing a trust business in this State, in addition to a general banking business," approved February 10, 1915:

1. Be it enacted by the general assembly of Virginia, That all national banks which have been, or hereafter may be, permitted by law to act as trustee and in other fiduciary capacities, shall have all the rights, powers, privileges and immunities conferred upon trust companies by an act of the general assembly of Virginia, entitled an act to provide how trust companies may be incorporated, and to provide for general powers for the purpose of doing a trust business in this State in addition to a general banking business.

WASHINGTON, Laws 1915, ch. 38, p. 131, "An Act relating to trust companies, national banks, state banks, amending section 3346 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 6, 1915:

* * * Provided, That national banks, having a paid up capital of $50,000, or more

when authorized or permitted so to do by or under any act of the Congress of the United States, may exercise any of the powers conferred upon trust companies organized under this act: And provided further, That any state bank organized under the laws of the State of Washington, having a paid up capital of fifty thousand ($50,000) dollars or more may exercise any of the powers conferred upon trust companies organized under this act by first obtaining permission from the state bank examiner. * * *

II.

STATUTES WHICH MAY BE HELD TO LIMIT EITHER EXPRESSLY OR BY POSSIBLE IMPLICATION THE POWER OF NATIONAL BANKS TO CARRY ON TRUST COMPANY BUSINESS.

CALIFORNIA, Henning's General Laws, vol. 5, 1914, Art. I, sec. 6 (p. 238), "Banks and Banking," provides:

The term "trust company," when used in this act, means any corporation which is incorporated under the laws of this state for the purpose of conducting the business of acting as executor, administrator, guardian of estates, assignee, receiver, depositary, or trustee under appointment of any court or by authority of any law of this state, or as trustee for any purpose permitted by law.

Art. IV, sec. 90 (bottom p. 272):

* * * No foreign corporation shall have or exercise in this state the power to act as trustee under any mortgage, deed of trust,

or other instrument securing notes or bonds issued by any corporation * * *.

DELAWARE, Revised Code of 1915, Ch. 20, "Insurance Department," sec. 70, p. 307, provides:

Any court, judge, or officer authorized by law to appoint any person or corporation to any office of trust, may, in its or his discretion, appoint to such office any trust company incorporated under the laws of this State, and having its principal office or place of business in this State, provided the said court, judge, or officer shall be satisfied that the capital stock of such corporation shall have been fully paid in cash, and that such corporation is authorized by its charter to perform the duties of said office.

(This provision was originally enacted as Act of March 23, 1903, Laws of 1901–1903, vol. 22, ch. 388, sec. 1, p. 749.)

MAINE, Revised Statutes, 1916, under ch. 52, sec. 84, p. 833, entitled "Savings Banks, Trust and Banking Companies, Loan and Building Associations, Foreign Investment Corporations," sub-title "Trust and Banking Companies," provides:

No trust or banking company, association, or institution, incorporated under the laws of this state, or of any other state and doing business in this state, shall act or do business as administrator or guardian, anything in their charter to the contrary notwithstanding.

(This section was originally enacted as Act of March 13, 1889, Laws of 1889, ch. 312, p. 275.)

NEW HAMPSHIRE, Laws of 1915, ch. 109, sec. 34, p. 126, entitled "An act to provide for the incorporation and management of trust companies and similar corporations," approved Apr. 8, 1915, provides:

No trust company, loan and trust company, loan and banking company, bank or banking company, or similar corporation, shall hereafter be appointed administrator of an estate, executor under a will, or guardian or conservator of the person or property of another.

(Sec. 15, p. 122, empowers such corporations to act as trustee, and sec. 16, to act as registrar.)

NEW YORK, Laws of 1914, ch. 369, "An Act in relation to banking corporations, and individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting chapter two of the consolidated laws," Article V, sec. 223, p. 1371, approved Apr. 16, 1914, provides:

No corporation other than a trust company organized under the laws of this state shall have or exercise in this state the power to receive deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this state any of the powers specified in subdivisions one, four, five, six, seven and eight of section one hundred eighty-five of this article, nor have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except

that a federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States and any domestic corporation legally exercising any of the powers conferred by such subdivision at the time this act takes effect may continue to exercise such powers * * *.

Subdivisions one, four, five, six, seven, and eight of section 185 of Article Five, relating to trust companies, are as follows:

1. To act as the fiscal or transfer agent of the United States, of any State, municipality, body politic or corporation; and in such capacity to receive and disburse money, to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness, and to act as attorney in fact or agent of any person or corporation, foreign or domestic, for any lawful purpose.

4. To act as trustee under any mortgage or bonds issued by any municipality, body politic or corporation, foreign or domestic, and accept and execute any other municipal or corporate trust not prohibited by the laws of this State.

5. To accept trusts from and execute trusts for married women, in respect to their separate property, and to be their agent in the management of such property or to transact any business in relation thereto.

6. To act under the order or appointment of any court of competent jurisdiction as guardian, receiver or trustee of the estate of any minor, and as depositary of any moneys

paid into court, whether for the benefit of any such minor or other person, corporation, or party, and in any other fiduciary capacity.

To be appointed and to act under the order or appointment of any court of competent jurisdiction as trustee, guardian, receiver, or committee of the estate of a lunatic, idiot, person of unsound mind or habitual drunkard, or as receiver or committee of the property or estate of any person in insolvency or bankruptcy proceedings; to be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed of the estate of any deceased person.

7. To take, accept, and execute any and all such legal trusts, duties, and powers in regard to the holding, management and disposition of any estate, real or personal, wherever located and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of competent jurisdiction, or by any person, corporation, municipality or other authority and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

8. To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or entrusted or committed to it by any person or persons, or any body politic, corporation, domestic or foreign, or other authority by grant, assignment, transfer, devise, bequest or otherwise, or which may be entrusted or committed

or transferred to it or vested in it by order of any court of competent jurisdiction, or any surrogate, and to receive, take, manage, hold and dispose of according to the terms of such trust or power any property or estate, real or personal, which may be the subject of any such trust or power.

III.

STATUTES EXPRESSLY AUTHORIZING TRUST COMPANIES, OR STATE BANKS EMPOWERED TO DO TRUST COMPANY BUSINESS, TO BECOME MEMBERS OF THE FEDERAL RESERVE SYSTEM.

CALIFORNIA, Act of May 6, 1913 (Statutes & Amendments to the Codes, 1913, ch. 104, sec. 22, p. 149, in connection with sec. 56, p. 160), as amended by the Act of June 3, 1915 (Statutes & Amendments to the Codes, 1915, ch. 608, sec. 56, p. 1112).

DELAWARE, Act Mar. 8, 1915 (Laws 1914, ch. 107, sec. 18, p. 323.)

GEORGIA, Act of August 13, 1915 (Georgia Laws, 1915, Title IV, p. 33).

IDAHO, Act of March 11, 1915 (Session Laws, 1915, sec. 41a, p. 196).

IOWA, Supplemental Supplement Code of Iowa 1915, sec. 1889–0.

KENTUCKY, Act of March 14, 1914 (Acts 1914 Kentucky, ch. 16, p. 61 et seq.)

LOUISIANA, Act July 9, 1914 (Laws 1914, ch. 305, sec. 1, 2, p. 631).

MAINE, Act of March 31, 1915 (Laws of Maine, 1915, ch. 262, pp. 233–234).

MASSACHUSETTS, Act of May 19, 1914 (Acts 1914, ch. 537, p. 472).

MINNESOTA, Act of March 6, 1915 (Laws of 1915, ch. 28, p. 36).

MISSISSIPPI, Act of March 9, 1914 (Laws of Mississippi, 1914, ch. 124, sec. 64, p. 139).

MISSOURI, Act of March 25, 1915 (Laws, Missouri, 1915, Art. III, sec. 127, p. 167).

MONTANA, Act of March 6, 1915 (Laws of Montana, 1915, ch. 89, sec. 23, p. 130).

NEW JERSEY, Act of Apr. 14 (Laws of 1914, ch. 159, p. 293).

NEW MEXICO, Act of March 15, 1915 (Laws of 1915, ch. 67, sec. 96, p. 105).

NEW YORK, Act of April 16, 1914 (Laws of New York, 1914, vol. 2, ch. 369, sec. 185, sub-div. 12, p. 1344).

NEBRASKA, Act of April 12, 1915 (Laws of 1915, ch. 175, p. 359).

NEVADA, Act of February 26, 1915 (Laws of 1915, ch. 31, p. 32).

NORTH DAKOTA, Act of February 10, 1915 (Laws of 1915, ch. 54, p. 61).

OHIO, Act of February 17, 1914 (Laws of Ohio, 1914, House Bill No. 5, pp. 185–186).

OREGON, Act of February 24, 1915 (Laws of 1915, ch. 285, sec. 2, par. 9, p. 427).

SOUTH CAROLINA, Act of February 18, 1914 (Laws of 1914, ch. 333, p. 588).

UTAH, Act of March 15, 1915 (Laws of Utah, 1915, ch. 47, sec. 1, p. 53).

VIRGINIA, Act of March 2, 1914 (Acts of Assembly, 1914, ch. 27, pp. 42–43).

WASHINGTON, Act of March 6, 1915 (Laws of Washington, 1915, ch. 35, sec. 5, p. 128).

IV.

IN ADDITION TO THE STATUTES WHICH CONFER BOTH CLASSES OF POWERS UPON THE SAME CORPORATION, CITED ON PAGES 28 TO 31 OF THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, SEE:

COLORADO, Laws of 1915, ch. 48, approved April 12, 1915, p. 135–6, "An Act relating to banking," secs. 1 and 2.

MASSACHUSETTS, Acts of 1914, sec. 3, ch. 537, p. 473, "An Act relative to Trust Companies."

MISSOURI, Laws of 1915, p. 102, Art. 1, "State Banking Department," "An Act to repeal articles I, II and III of chapter 12 of the Revised Statutes of 1909, relating respectively to "State banking department," "banks of deposit and discount," and "trust companies" * * * and to enact in lieu of all thereof new articles entitled respectively

"state banking department," "Banks" and "trust companies," to be designated respectively as articles I, II and III of said chapter 12, with an emergency clause. Article III, "Trust Companies," sec. 127 (pp. 165–167).

OREGON, Laws of 1915, ch. 285, p. 427, "An act to amend sections 4559 etc. * * * pertaining to banks and bankers, and repealing all Acts and parts of Acts in conflict with the provisions of this Act."

VIRGINIA, ch. 486, p. 817, Laws of 1916, act approved March 22, 1916, provides "how trust companies may be incorporated, and to provide for general powers for the purpose of doing a trust business in this State in addition to a general banking business."

WYOMING, Laws of 1915, ch. 93, p. 104, "An Act permitting State Banks, Saving Banks and Loan and Trust Companies to act generally as agent, attorney, trustee, executor, administrator or guardian."

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